EDITOR'S NOTE

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(3)

NO. 84-6807

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MILLIE R. LEE, PETITIONER,

VS.

THE STATE OF ILLINOIS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

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APP

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Millie R. Lee, respectfully petitions This Honorable Court to issue a writ of certiorari to the Appellate Court of Illinois, Fifth Judicial District.

(a)

QUESTION PRESENTED FOR REVIEW

This petition for a writ of certiorari presents the question of whether the petitioner's sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of the inculpatory confession of her co-defendant as substantive evidence of her guilt.

(b)

LIST OF ALL PARTIES TO PROCEEDINGS IN THE APPELLATE COURT

The above caption to the case contains the names of all the parties.

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(d)

REFERENCE TO REPORTS OF OPINIONS

The decision of the Appellate Court of Illinois, Fifth Judicial District, was filed on December 7, 1984, People v. Millie R. Lee, (5th Dist. No. 5-82-539, Rule 23 Order filed December 7, 1984), and appears as Appendix A to this petition. The order of the Supreme Court of Illinois denying her petition for leave to appeal was filed on April 2, 1985, People v. Millie R. Lee, Docket No. 61304, and appears as Appendix B to this petition.

(e)

JURISDICTION OF THE

UNITED STATES SUPREME COURT

Jurisdiction of This Honorable Court is invoked under the provisions of 28 U.S.C. §1257(3). This petition is being filed within sixty days of the decision of the Supreme Court of Illinois which refused a timely request that it review the decision of the Appellate Court of Illinois which affirmed the petitioner's conviction.

(f)

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

* * *

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

(g)

STATEMENT OF THE CASE

On April 16, 1982, a bill of indictment was returned by the grand jury of St. Clair County, Illinois, charging the petitioner and her co-defendant, Edwin Thomas, with the murders of Mattie Darden and Odessa Harris. (R.C13-14) On June 1, 1982 the petitioner waived trial by jury. (R.C51-56) Petitioner and Edwin Thomas were jointly tried before the bench in the St. Clair County Circuit Court on July 7-8, 1982.

On February 13, 1982, Lily May Williams resided in Apartment 35C in the Roosevelt Homes, East St. Louis, Illinois. (R.11) Sometime during the late evening she discovered and extinguished a fire in the closet of the next door apartment (35B). (R.12-13) East St. Louis Fireman Lavester Heavens, who had responded to the report of the fire, discovered a body upside down in the closet of apartment 35B. He also discovered a can of charcoal lighter fluid on the floor by the closet. (R.13-16) The body had been burned and had a number of stab wounds. (R.19-21)

On the morning of February 14, 1982 East St. Louis Police Detective Sandra Muckensturm spoke with James Trione, the owner of the Bunkum Liquor Store directly across the street from the Roosevelt Homes. (R.25) Mr. Trione informed the police that he had sold a can of Gulf charcoal lighter fluid on February 11, 1982, late in the evening, to an individual named "Renee". Trione identified petitioner at trial as "Renee". (R.55-59) Additionally, a purse was found by police officer James Detloff approximately one hundred feet south of apartment 35B. Inside the purse was the identification of Odessa Donahue. (R.26, 140,166) Police began a search for Odessa Donahue. (R.166-67) Their investigation led them to the petitioner's apartment, apartment 33B in the Roosevelt Homes. (R.167-70)

On February 15, 1982 East St. Louis Police Detective Sergeant L. C. Moore, Sergeant Ezell, and Detective Brinkley went

to the petitioner's apartment. (R.100,170) They were invited into the apartment and noticed that the apartment was in a shambles. Furniture had been moved around, walls had been painted, and a mop and a bucket were visible. (R.102,173) The petitioner informed the police that she did not know the whereabouts of Odessa Donahue, also known as Odessa Harris. (R.102,172) The petitioner stated that the apartment was her auht Mattie Darden's, who was out of town visiting relatives. Petitioner also stated that she was related to Odessa (Donahue) Harris by marriage. (R.103,172) The petitioner agreed to go to the East St. Louis Police Department in order to determine whether she could identify the body discovered in the closet. (R.103,174)

At the East St. Louis Police Department the petitioner was shown several photographs of the body. Detective Brinkley had been informed that the body found in the closet was not that of Odessa Harris. (R.107-08,188-89,175) Detective Brinkley observed that the petitioner was crying while she was viewing the photographs of the body. He advised petitioner of her rights under Miranda. (R.104,175)

The petitioner gave a number of conflicting accounts concerning the whereabouts of Odessa Harris and Mattie Darden. (R.106,178) The petitioner eventually admitted that the body in the closet was that of Mattie Darden and that Odessa Harris was also dead. She admitted that she was involved in the death of Mattie Darden, that Edwin Thomas also was involved, and that Edwin Thomas killed Odessa Harris. (R.109,179) The police placed the petitioner under arrest, read the petitioner her Miranda rights again, and called Detective Muckensturm to take a written statement from the petitioner. (R.179-80)

Detective Muckensturm advised petitioner of her rights under Miranda and began taking a statement from petitioner approximately 8:40 p.m. on February 14, 1982. (R.28) Later, on February 17, 1982, East St. Louis Police Officer Lenzie Stewart took a written statement from petitioner which corrected some errors in her previous statement. (R.194-99)

Petitioner's statements related that on Thursday, February 11, 1982, she was with her boyfriend (Edwin Thomas) at the apartment which she shared with her aunt Mattie Darden. Mattie Darden returned to the apartment with Odessa Harris. At one point the petitioner was in the kitchen having an argument with Odessa Harris. Mattie Darden was in her bedroom. As Odessa Harris left the kitchen and went into the living room, Edwin Thomas stabbed Odessa Harris. Odessa Harris called for help. The petitioner ran into her aunt's bedroom. Her aunt was in the bedroom with a knife and swung the knife at the petitioner. The petitioner ran back into the kitchen, got a knife, and went into the bedroom where she stabbed her aunt a number of times. Mattie Darden was lying on the floor alive. The petitioner obtained an iron skillet from Edwin Thomas and hit Mattie Darden on the head a couple of times, at which point the skillet broke. Edwin Thomas obtained another skillet and the petitioner again hit Mattie Darden with the skillet. Edwin Thomas stated that she was not hitting Mattie Darden hard enough. He took the skillet and hit Mattie Darden on the head. They then put Odessa Harris' body in a trunk and put the trunk in an alley behind the apartment. They carried Mattie Darden's body wrapped in a couple of blankets to apartment 358 and placed the body in the living room closet.

The petitioner then went to the Bunkum Road Liquor Store and purchased a can of lighter fluid. Approximately midnight, Edwin Thomas poured lighter fluid on the body of Odessa Harris and set it on fire. They then began cleaning up the apartment. The next day they checked the trunk and discovered that the upper part of Odessa Harris' body had not completely burned. They placed most of the remains in a cardboard box which they set out with the trash. On Saturday, February 13, 1982, approximately 10:00 p.m., Edwin Thomas went back to apartment 358 to burn the body of Mattie Darden. Edwin Thomas took the can of lighter fluid with him. Mr. Thomas returned to the apartment and told her he had set the body on fire, but that someone may have called the fire department and the police. (See Supplement to the record, statement of Millie Lee)

Edwin Thomas was arrested and advised of his rights under Miranda by Detective Walker and Detective Sergeant Moore. (R.91-96,110-12) Eventually Mr. Thomas gave a written statement. (R.113-15,135) Mr. Thomas' written statement essentially followed the statement of the petitioner. However, Mr. Thomas' statement additionally related that the petitioner and he had discussed on prior occasions killing Mattie Darden due to severe personality conflicts between the petitioner, Edwin Thomas, and Mattie Darden. Mr. Thomas' statement also detailed that they discussed killing Mattie Darden the evening of February 11, 1982, but that they wanted Odessa Harris to leave. Odessa Harris did not leave and they were forced to kill her also. Mr. Thomas related that he had the petitioner lure Odessa Harris into the kitchen and he attacked Odessa Harris with a knife. He stabbed her a number of times on the floor of the kitchen, eventually killing her. The petitioner then went into her aunt's bedroom and stabbed Mattie Darden. They then disposed of the bodies as the petitioner had described in her statement. (See supplement to the record, statement of Edwin Thomas)

The police searched the petitioner's apartment with her consent. Detective Brinkley and Alva Busch went to the petitioner's apartment and obtained some charred human bones and a broken skillet from the trash can behind the apartment. (R.78-82,181) They also located the knives which were used in the attacks. (R.183)

An autopsy determined that Mattie Darden died due to multiple stab wounds to the chest as well as blunt trauma to the head. (R.77)

Dr. William A. Murphy, a specialist in radiology, examined the charred human bone fragments and took x-rays of them. He compared those x-rays to x-rays taken from the medical file of Odessa (Donahue) Harris. (R.143-49,153) From his comparison of the x-rays he was able to determine that the bone fragments were those of Odessa (Donahue) Harris. (R.153-57)

It was determined that Edwin Thomas' left thumbprint was on the can of Gulf charcoal lighter fluid discovered in apartment 358. (R.160-62)

The trial court found both petitioner and Edwin Thomas guilty of the murders of Odessa Harris and Mattie Darden. (R.239) The trial court, sitting as the trier of fact, stated in rejecting the defense arguments:

> As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passion, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant [Edwin Thomas] took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out. Now that isn't sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238)

On September 7, 1982, the petitioner was sentenced for the murder of Odessa Harris to a term of forty years incarceration. (R.C73) For the murder of Mattie Darden the petitioner was sentenced to a term of natural life imprisonment. (R.C74) Timely notice of appeal to the Appellate Court of Illinois, Fifth Judicial District, was filed on September 8, 1982. (R.C80)

On appeal to the Appellate Court of Illinois petitioner contended, inter alia, that her sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of Mr. Thomas' confession against her. On December 7, 1984, the Appellate Court of Illinois, Fifth Judicial District, in an unpublished order rejected her argument. Petitioner filed a timely petition for leave to appeal to the Supreme Court of Illinois, and it was denied on April 2, 1985.

REASON FOR GRANTING THE WRIT

THIS HONORABLE COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE DECISION OF THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT, IS IN CONFLICT WITH THIS COURT'S DECISIONS IN BRUTON V. UNITED STATES AND PARKER V. RANDOLPH BECAUSE THE TRIAL COURT CONSIDERED THE CO-DEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE OF PETITIONER'S GUILT, A VIOLATION OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER.

Among the paramount rights afforded by the Constitution of the United States is the right of an accused to require that the accusers appear before the trier of fact and subject those accusations to cross-examination. The Sixth Amendment of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him... .

U.S. Const. amend. VI. This Honorable Court held in Pointer v. Texas, 380 U.S. 400 (1965) that the sixth amendment right to confront the witnesses against a defendant is applicable to the States through the fourteenth amendment. The denial of this right "calls into question the ultimate 'integrity of the fact-finding process'". Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

In Bruton v. United States, 391 U.S. 123 (1968) This Honorable Court held that the right of confrontation includes the right of cross-examination and is violated at a joint jury trial when a co-defendant's confession inculpating the defendant is admitted into evidence and the co-defendant does not testify. In Bruton Your Honors established that there is too great a danger that the jury could not follow the instructions of the court not to consider a co-defendant's confession against the defendant. The rule had previously been that a proper jury instruction which limited the use of the co-defendant's confession strictly against

the co-defendant was proper.[1] 391 U.S. at 135-36; See Delli Paoli v. United States, 352 U.S. 232 (1957).

While this case was tried before the bench and not a jury, the petitioner's sixth and fourteenth amendment right of confrontation was violated, since the trial court considered the most inculpatory parts of co-defendant Edwin Thomas' confession against her. In pronouncing petitioner guilty of both murders, the trial court, sitting as the trier of fact, stated:

> As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passions, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant [Edwin Thomas] took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out. Now that isn't sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238) (emphasis added)

Mr. Thomas did not testify at their joint trial and petitioner was therefore not able to subject Mr. Thomas' accusations to cross-examination.

The Appellate Court of Illinois, Fifth Judicial District, agreed that the trial court considered Mr. Thomas' confession against the petitioner (Order at 5), however The Court rejected petitioner's contention that her sixth and fourteenth amendment [illegible] (Order at 6) The Court stated:

---

[1] For Illinois' limiting instruction see I.P.I.-Criminal 2d No. 3.08.

> It is well settled that a substantial difference exists between the Bruton rule and the interlocking confession situation. In the former situation, a jury hears only the co-defendant's statement incriminating the defendant who has himself made no admissions whatsoever, whereas in the latter situation, the jury hears a co-defendant's statement incriminating the defendant who had himself made similar inculpatory admissions. When the interlocking admissions are inculpatory, the admission of co-defendant's incriminating statement against defendant does not fall within the Bruton rule. Hence defendant's first argument fails. People v. Bassett (1974), 56 Ill. 2d 285, 307 N.E.2d 359, 365; People v. Rosochaki (1969), 41 Ill. 2d 483, 244 N.E.2d 136, 141-42. (Order at 6)

The Appellate Court of Illinois' reliance upon Bassett and Rosochacki is a fundamental misapplication of the law. In People v. Rosochaki, 41 Ill. 2d 483, 244 N.E.2d 136 (1969), the Illinois Supreme Court held that where a nontestifying co-defendant's extrajudicial statement is admitted as evidence of the declarant's guilt at a joint trial in violation of the Bruton rule, the prejudice inherent in such evidence is diminished if the defendant has himself made a similar statement. For this reason, admission of a nontestifying co-defendant's interlocking confession can under some circumstances be harmless error. This was the position of Justices Stevens, Brennan, Marshall and Blackmun in Parker v. Randolph, 442 U.S. 62 (1979). In People v. Bassett, 56 Ill. 2d 285, 307 N.E.2d 359 (1974), the Illinois Supreme Court apparently adopted sub silentio the position that "interlocking confessions" do not fall within the Bruton rule. This was the position taken by Justices Rehnquist, Stewart, White and Chief Justice Burger in Parker.

In Parker This Honorable Court reviewed the order of the District Court granting habeas corpus relief to three nontestifying co-defendants who had made interlocking confessions which were admitted at their joint trial. Chief Justice Burger and Justices Rehnquist, Stewart, and White expressed the view that the admission of interlocking confessions of nontestifying co-defendants with proper limiting instructions conforms to the requirements of the sixth and fourteenth amendments. Justice Rehnquist, speaking for the four justices reasoned that:

> The right protected by Bruton -- the "constitutional right of cross-examination," id., at 137 -- has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a co-defendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged.

Parker v. Randolph, 442 U.S. at 73 (emphasis added).

Justice Blackmun concurred in the results reached in the plurality opinion but disagreed with the view that there was per se no violation of the sixth amendment right of confrontation when the defendant has made a statement similar to that of his non-testifying co-defendant. Justice Blackmun expressed the view that admission of the nontestifying co-defendant's statement was error, that the degree of prejudice inherent in the error should be examined on a case-by-case basis, and that reversal was not required where the error was harmless beyond a reasonable doubt, as in Parker. Parker v. Randolph, 442 U.S. at 77-81.

Justice Stevens writing for the three dissenting justices reasoned that the plurality incorrectly assumed "that all unchallenged confessions by a defendant are equally reliable". Parker v. Randolph, 442 U.S. at 84. Justice Stevens pointed out that in some cases the defendant's inculpatory statement may be ambiguous, incomplete or the result of coercive influences and thus not sufficiently convincing to negate prejudice inherent in violating his constitutional right to cross-examine his co-defendant. Parker v. Randolph, 442 U.S. at 84-86.

That the petitioner was tried by the court merely compounds the error in this case as the Illinois Supreme Court stated in People v. Reichert, 352 Ill. 358, 185 N.E. 585, 586 (1933), "[c]ourts have no more right than a jury to convict the accused on incompetent evidence." In United States v. Longee, 603 F.2d 1342 (1979) the Ninth Circuit Court of Appeals held that a Bruton problem may be reversible error in a trial before the bench. The court in Longee stated:

> The fact that the defendants were tried to the court rather than to a jury does not eliminate the error. The disregard of

> incriminating evidence as against only one defendant in a joint trial has been termed "a mental gymnastic which is beyond, not only [the jury's] powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (L. Hand, J.), quoted in Bruton, 391 U.S. at 132 n.8, 88 S.Ct. at 1626. It is for this reason that the use of a limiting instruction in a jury trial is inadequate to cure the error. Bruton, 391 U.S. at 135-37, 88 S.Ct. at 1627-29. Here, there was neither an objection by defense counsel nor an indication in the record that the district judge attempted to disregard Chaser's statements as evidence against Longee. Indeed, he specifically referred to them in his findings.

603 F.2d at 1345.

While petitioner's and Mr. Thomas' statements contain many similarities, crucial differences do exist which do not make the statements "interlocking confessions". Those crucial differences are the points relied upon by the trial court in rejecting petitioner's defense at trial. Petitioner's statements are not a confession to murder.[2] Mr. Thomas' statements are a confession to two murders.

---

[2]The Illinois murder statute states:

> A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another, or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another, or
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Ill. Rev. Stat., 1983, Ch. 38, §9-1(a).

The petitioner's defense at trial was that she was not accountable for the death of Odessa Harris.[3] (R.232-34) Petitioner's statements to the police only indicated that co-defendant Thomas stabbed Odessa Harris to death. Petitioner's statement did not indicate a prior plan to murder Odessa Harris, nor did it indicate prior knowledge that Mr. Thomas would stab Odessa Harris. Petitioner also argued at trial that the killing of Mattie Darden could only be considered

---

[3]The Illinois accountability statute states:

> A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both.

Ill. Rev. Stat., 1983, Ch. 38, §5-1. Section 5-2 states:

> A person is legally accountable for the conduct of another when:
>
> (a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or
>
> (b) The statute defining the offense makes him so accountable; or
>
> (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempt to aid, such other person in the planning or commission of the offense....

Ill. Rev. Stat., 1983, Ch. 38, §5-2.

voluntary manslaughter[4] due to either an unreasonable belief in self-defense, or her intense and sudden passion, since when she ran into Mattie Darden's bedroom she was confronted by Mattie Darden with a knife. The petitioner then ran out and obtained a knife which she used to stab Mattie Darden.

The trial court rejected petitioner's defenses based on Mr. Thomas' confession. The petitioner's and Mr. Thomas' statements are not "interlocking" in the crucial area of knowledge and intent. Petitioner was therefore severely prejudiced by the trial court's use of Mr. Thomas' confession.

The reasoning of the Appellate Court fails when it states:

> Although the judge did consider co-defendant Thomas' confession, it is evident from the record that he considered the defendant's confession as well. Defendant's statement reveals her attack on Darden was not the result of self-defense, for after she had left Darden's bedroom originally there was no need for her to return to the bedroom. Furthermore, defendant alluded to a plan in her own confession, where she stated:

---

[4]The Illinois voluntary manslaughter statute states:

> A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.
>
> (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, [illegible] the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Ill. Rev. Stat., 1983, Ch. 38, §9-2

> Lee: Me, and Edwin [sic] had talked about stopping aunt Mattie from harrassing me before.* * *

(Order at 5). The Court incorrectly assumed that this showed a plan on the part of petitioner to murder Mattie Darden. Petitioner's statement does not show an intent to kill, nor a plan to murder Mattie Darden. The Court ignored the continuation of petitioner's statement when she told the police:

> Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that [sic] when he began talking about doing something to aunt Beetty [sic], but he never said what.

(Supplement to the record, Statement of Millie Lee, 10-11) (emphasis added) No prior plan between petitioner and Mr. Thomas can be found in petitioner's statement.

Justice Stevens' concern in Parker that the defendant's statement may be ambiguous or incomplete is present in this case. Petitioner's statement is incomplete in that it is not a confession to murder; it demonstrates no intent to kill or premeditation on her part. It is incomplete in that the trial court had to utilize co-defendant Thomas' confession to impute to petitioner such an intent to kill and such a prior plan to commit murder. On the other hand, Justice Rehnquist's theory of harmlessness is not present. Contrary to his assertion in Parker that cross-examination and impeachment of the co-defendant's statement would "likely yield small advantage to the defendant", impeachment of Mr. Thomas' confession as to the existence of a plan and intention to kill would reap great dividends for the petitioner here. And, it must be remembered that it was only through co-defendant Thomas' confession that these factors were established. The trial court's error in considering Mr. Thomas' confession against petitioner cannot be harmless error under Parker.

This Honorable Court in Bruton was concerned that:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . .Such a context is presented

> here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the confrontation clause was directed.

391 U.S. at 135-36.

In this case we do not have just the danger that the trier of fact will not follow the law as in Bruton, but the trial court's own statement that it was not following the law. Consequently, constitutional error was committed by the trial court and the Appellate Court of Illinois sanctioned such error.

CONCLUSION

The petitioner's right to confront the witnesses against her was violated by the court's consideration against her of the more inculpatory portions of her nontestifying co-defendant's confession. This Honorable Court's decisions in Bruton v. United States and Parker v. Randolph demonstrate that the Appellate Court of Illinois, Fifth Judicial District, erroneously determined that no sixth and fourteenth amendment violation occurred. Therefore the petitioner prays that This Honorable Court issue a writ of certiorari the Appellate Court of Illinois, Fifth Judicial District, reverse the decision of that court and the Circuit Court of St. Clair County, and grant the petitioner a new trial.

Respectfully submitted,

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84-6807
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October Term, 1985

MILLIE R. LEE,

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THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the admission of an interlocking confession at a confessing co-defendant's trial violates the sixth and fourteenth amendments.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

MILLIE R. LEE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Appellate Court of Illinois for the Fifth Judicial District insofar as the petitioner's issue does not raise a question of constitutional proportion worthy of review by this Court.

OPINION BELOW

The petitioner seeks review from an Illinois Appellate Court, Fifth District, opinion in People v. Millie R. Lee, No. 5-82-539 (5th Dist. 1984). A copy of the opinion is included with petitioner's petition. The petitioner's petition for leave to appeal to the Illinois Supreme Court was denied April 2, 1985.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition. As treated more fully in the argument contained herein, however, petitioner has not shown grounds for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

STATEMENT OF FACTS

In 1982, petitioner and her co-defendant, Edwin Thomas, were indicted for the murders of Mattie Darden and Odessa Harris. Both defendants were found guilty following a bench trial and were sentenced to serve extended prison sentences.

In the course of the police investigation following the murders, both petitioner and her co-defendant gave strikingly similar 11-page statements describing the murders.

Petitioner now assigns as error warranting Supreme Court review the admission at her trial of co-defendant Thomas' confession.

REASONS FOR DENYING THE WRIT

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decision below. The Illinois Appellate Court gave full consideration to the issues presented and decided them in accord with prevailing constitutional principles. Thus, the petition for a writ of certiorari does not present the kind of novel or pressing issue worthy of review by this Court.

Petitioner's contention that her sixth and fourteenth amendment rights were violated is squarely governed by the rule set out in Parker v. Randolph, 442 U.S. 62 (1979). In Parker, the United States Supreme Court held that admission of interlocking confessions conforms to sixth and fourteenth amendment principles so long as proper limiting instructions are given. 442 U.S. at 74-75. Those limiting instructions

should advise the jury that the co-defendant's extrajudicial statements are to be considered only against the declarant. 442 U.S. at 73-74.

Petitioner claims specifically 1) that her confession should not have been construed as an "interlocking confession" because she allegedly did not confess to murder and, apparently alternatively, because the two confessions are allegedly not interlocking as to knowledge and intent; 2) that the Illinois Appellate Court erroneously relied on two Illinois Supreme Court decisions; and 3) that the trial court erroneously based its finding of guilt in part on the confession given by petitioner's co-defendant.

Regarding petitioner's first claim, Parker apparently does not require more than that each confession suggest guilt or that each confession at least factually interlock with the other. See Parker, 442 U.S. at 80. Interlocking confessions may be distinguished by comparison with the confession at issue in Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the Court censured as violative of the sixth amendment the use of a non-testifying co-defendant's confession against a non-confessing defendant. 391 U.S. at 128. In the case at bar, petitioner and her co-defendant each rendered a detailed confession describing the commission of the two murders committed in the same place and at the same time. Petitioner's statement that her confession did not constitute a confession to murder is a conclusion of fact the appellate court clearly and reasonably found unwarranted in light of petitioner's eleven page rendition of the gruesome sequence of events. Further, the trial record shows that the confession of petitioner's co-defendant unquestionably inculpated her. Parker does not require more than this; neither does it isolate knowledge or intent as essential elements of interlocking confessions.

Petitioner's second contention, that the Illinois Appellate Court erroneously relied on two Illinois Supreme Court decisions, simply comprises a misreading of the two cited opinions which in fact may be viewed as precursors of the Parker rule. In the first case, People v. Rosochacki, 41 Ill.2d 483, 494, 244 N.E.2d 136, 142 (1969), the Illinois Supreme Court held that the introduction of what we would now refer to as an interlocking confession was harmless error. In the second case, People v. Bassett, 56 Ill.2d 285, 295, 307 N.E.2d 359, 365 (1974) the Illinois Supreme Court said the admission of "interlocking confessions" was not error. These cases are clearly in accord with the Parker rule. While the appellate court perhaps misapplied the Parker rule in form by failing to make clear that a co-defendant's confession may be used only against the declarant, the court's exposition of the trial court's reliance on petitioner's confession shows that the rule was understood and applied in substance.

Petitioner's final claim is that the trial court erroneously based its finding of guilt partially on the co-defendant's confession. While the court should not in any way have considered the co-defendant's confession against petitioner, Parker, 442 U.S. at 73-74, the Court's glancing references to that confession, and the appellate court's refusal to reverse on that basis, do not present the kind of fundamental and flagrant constitutional error that warrants review by this Court. As the Illinois Appellate Court pointed out, although the trial court relied in part on the co-defendant's confession, it relied on petitioner's confession as well. For example, the trial court noted during its pronouncement of guilt that the co-defendant's confession suggested a previously conceived plan, rather than a spontaneous act. Yet the Court also reviewed and doubtlessly relied on petitioner's confession stating that "Me, and Edwin (her co-defendant) had talked about stopping Aunt Mattie from

harassing me before . . ." Thus, the Illinois Appellate Court could reasonably have found that the trial record indicated that the Court considered petitioner's confession in reaching its finding of guilt. Certainly every reference to a co-defendant's confession does not constitute reversible error or merit Supreme Court review. See Kirksey v. Jones, 673 F.2d 58, 59-60 (2d Cir. 1982) (prosecutor's references in summation to co-defendant's confession not error). Indeed, the Illinois Appellate Court's two references to the co-defendant's confession could be fairly read as injudicious but superfluous support for an already well-grounded finding of guilt.

Accordingly, the decision of the Illinois Appellate Court was correct and in accord with prevailing constitutional principles. Petitioner's claim is thus unworthy of review by this Court and his petition should be denied.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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MAY 28 1985
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SUPREME COURT, U.S.

NO. 84 6807

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MILLIE R. LEE, PETITIONER,

VS.

THE STATE OF ILLINOIS, RESPONDENT.

NOTICE AND PROOF OF SERVICE

TO: Honorable Alexander L. Stevas
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Please take notice that I have mailed the original of the petition for writ of certiorari and the motion for leave to proceed in forma pauperis in the above-captioned matter to the Clerk of the above Court and that I am serving the Illinois Attorney General, the St. Clair County State's Attorney, the State's Attorneys Appellate Service Commission and the petitioner each with one copy by depositing the copies in the mail in Mt. Vernon, Illinois, with sufficient prepaid postage and addressed as indicated on this 22nd day of May, 1985.

Respectfully submitted,

Randy E. Blue

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Supreme Court, U.S.
FILED
AUG 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-6807

In the Supreme Court of the United States

OCTOBER TERM, 1985

MILLIE R. LEE, PETITIONER

v.

THE STATE OF ILLINOIS, RESPONDENT

ON WRIT OF CERTIORARI TO THE APPELLATE COURT
OF ILLINOIS, FIFTH JUDICIAL DISTRICT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 28, 1985
CERTIORARI GRANTED JULY 1, 1985

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	ITEM
April 16, 1982	Bill of Indictment
September 8, 1982	Judgment and Sentence Order
September 8, 1982	Notice of Appeal
December 7, 1984	Order of the Appellate Court of Illinois, Fifth Judicial District
April 2, 1985	Order of the Illinois Supreme Court denying leave to appeal

STATE OF ILLINOIS
IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

No. 82CF94

THE PEOPLE OF THE STATE OF ILLINOIS

-vs.-

MILLIE R. LEE and EDWIN R. THOMAS, DEFENDANT

BILL OF INDICTMENT

Filed April 16, 1982

The Grand Jury of St. Clair County charges:

COUNT I

That on the 11th day of FEBRUARY, 1982, in said County MALLIE R. LEE and EDWAN R. THOMAS committed the offense of MURDER in that.

THE SAID DEFENDANTS, WITHOUT LAWFUL JUSTIFICATION AND WITH THE INTENT TO KILL MATTIE DARDEN, STABBED MATTIE DARDEN WITH A KNIFE AND HIT MATTIE DARDEN ON OR ABOUT THE HEAD WITH BLUNT INSTRUMENTS AND SET FIRE TO THE BODY OF MATTIE DARDEN, THEREBY CAUSING THE DEATH OF MATTIE DARDEN, in violation of Section 9-1a1 Chapter 38, Illinois Revised Statutes.

COUNT II

That on the 11th day of FEBRUARY, 1982, in said County MILLIE R. LEE and EDWIN R. THOMAS committed the offense of MURDER in that.

THE SAID DEFENDANTS, WITHOUT LAWFUL JUSTIFICATION AND WITH THE INTENT TO KILL ODESSA HARRIS, STABBED ODESSA HARRIS WITH A KNIFE AND SET FIRE TO THE BODY OF ODESSA HARRIS, THEREBY CAUSING THE DEATH OF ODESSA HARRIS, in violation of Section 9-1a1 Chapter 38, Illinois Revised Statutes

A TRUE BILL

/s/ M. G. Biehl
Foreman

Bond: No Bail

WITNESS: DET. BRINKLEY

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

PEOPLE'S EXHIBIT NO. 22
INTRODUCED INTO EVIDENCE AT TRIAL
STATEMENT BY MILLIE R. LEE ON FEBRUARY 15, 1982

DEPARTMENT OF POLICE
EAST ST. LOUIS, ILLINOIS

STATEMENT

I, Millie Rene Lee, have been advised by Det. S. Muckensturm, East St. Louis, Police Dept., that I have a right to remain silent and that I do not have to make any statement, answer any questions or talk to anyone nor answer questions directed to me; I have further been advised that anything I say or any statement I give can and will be introduced into evidence in Court against me; I have been further advised that if I want an attorney to be present at this time or anytime hereafter that I am entitled to such attorney, and that if I cannot afford to pay for an attorney that an attorney will be furnished to me if I so desire, and that if I do desire an attorney I do not have to make any statement or answer any questions until such time as an attorney has consulted with me.

Having been advised of these rights as above, I hereby voluntarily agree to make a statement, to answer questions asked of me and I waive my right to have an attorney as above set forth. I further state that I have not been threatened or mistreated in any fashion nor have any promises of leniency been made to me in return for making this statement.

/s/ Millie Renee Lee

/s/ Det. Sgt. L. C. Moore #058
Witness

/s/ Det. S. Muckensturm #143
Witness

I am 18 years of age, born 6/2/63 at East St. Louis, Illinois. I am employed as a unemployed by the Social Security. I reside at 33B Roosevelt Homes, East St. Louis, Illinois. Married no Single yes. Home telephone 875-6004, Business telephone Na.

On Wednesday, February 10, 1982 me and my boyfriend Edwin Thomas and my baby were at my aunt's apartment where I have been staying for approx. two years. My aunt's name is Mattie Darden. She actually rents the apartment from the Housing Authority and then I pay her twenty four fifty a month and the telephone bill at the apartment.

While me and my boyfriend were at the apartment my aunt Mattie and Odessa Harris, she also goes by name of Odessa Donahue, she was married to my cousin M.C. Harris. I don't know if they are still married or not, came home to 33B Roosevelt Homes in a cab. My aunt had not been home since the Friday prior to that Wednesday. She had been out on a drinking binge and no one knew where she had been. She usually goes out drinking for a day or so. I knew she was at the Orr Weathers but I didn't know what apartment it was. She had called me on the phone, I don't know what day it was, but she called and told me that she had paid the rent.

Her and Odessa came inside, that was some time around 8:30 or 9:00 p.m. that Wednesday. When they came in Odessa layed down in the bed with her clothes on. She was wearing a white nurses aid uniform and some white shoes. She had taken off her coat, it was a beige trench coat with dark brown fur on the collar. My aunt Mattie got undressed and put on a long gown that had an orange background with blue flowers. She laid down in her bed that was loted in the bedroom.

Me and Edwin, my boyfriend were looking at t.v. I was washing dishes in the kitchen but I was walking back and forth watching t.v. My baby Marcus who is two years old went into the bedroom where Odessa and my

aunt Mattie were. I went to my aunt's bedroom door and told my baby to bring his butt out of there and get on the couch and play with his blocks. He started crying and came on out of the bedroom. After the baby came out of the bedroom I went back into the kitchen and started washing dishes again. Edwin came into the kitchen where I was at. Odessa and my aunt were talking in the bedroom loud enough to hear what they were saying. I heard my aunt say that since I had a boyfriend I didn't want the baby or her around. Me and Edwin had two or three words not really an argument. I think I had raised my voice when me and Edwin were kind of arguing. Odessa came out of the bedroom and came into the kitchen and asked what the hell was going on. She said we ought to be ashamed of ourselves arguing and making all that noise. I told her it was none of her business that she didn't live here and then she said if you like someone kicking your ass then let them. I told her that all those scars on her, it looked like someone had kicked her ass before too. Odessa had scars all over her face. She had a scar on her neck too. Odessa went back into the bedroom where my aunt was at. I called Odessa back into the kitchen and asked her if aunt Beetty, that is what we call my aunt had really paid the rent. Odessa told me that she had paid the rent and then she started talking about the argument between me and Edwin. I told her that the argument was all over. She was mumbling to herself as she was walking out of the room. Edwin was in the livingroom then. Edwin got up off a recliner chair, black in color that was in the livingroom. Odessa was giving him dirty looks. After Odessa gave Edwin a dirty look the last time and she was turning her head and walking back towards the bedroom, Edwin got up off the chair and had a knife in his hand. The knife is usually kept under the couch in the livingroom. We keep it here because a lot of burglaries and break ins happen out at the Roosevelt Homes. Odessa had brought the knife there a long time ago. The knife is

long like a machette with a black handle and a flexible blande. The knife is approx. twenty four inches long. When Edwin got up off the recliner he went over by Odessa and stabbed her in the back. I think he pushed the knife into her underhanded like. Odessa fell on the floor and I think she started calling to my aunt. When Edwin stabbed Odessa and Odessa was calling Aunt Beetty I ran, well, I don't know if I ran or walked into the bedroom. Edwin was standing over by the kitchen cabinet with the knife in his hand with blood on it. Odessa was laying there moaning. When I went into the bedroom my aunt Beetty was sitting on the bed and then she got up and had a knife in her hand. I don't know where the knife came from, my aunt usually kept her gun by her bed. I don't know what kind of gun it is. When my aunt got up off the bed she told me to get out of her way or she would kill me and then she swung at me with the knife. I ran into the kitchen and got a butcher knife that was sitting on the kitchen table and then I went back into the bedroom where my aunt was and then I stabbed her. I kept stabbing her. The first time I stabbed her, I hit her in the chest, I kept stabbing her and I really don't know where else I stabbed her. I had my eyes closed some of the time. My aunt Beetty fell onto the bed and then slid onto the floor. She was still alive. She was moaning and groaning. The knife I used was about a twelve inch butcher knife with a brown wooden handle. Aunt Beetty was still breathing and Edwin came into the bedroom. I told him that she was still breathing and told him to go and get the hammer. I was going to hit her with the hammer and try to knock her unconscious. Edwin came back into the bedroom and told me he couldn't find the hammer. I told him to go and get the skillet. He looked up under the sink in the cabinet for the skillet. He brought the skillet a black cast iron skillet back into the bedroom. I took the skillet from Edwin and hit my aunt Beetty in the head once or twice. The skillet broke. The skillet broke,

it like cracked in three or four places. Edwin said that I wasn't even hitting her hard enough. I think I hit her in the head and had hit the couch it is a black couch that sits in the bedroom too. I told him to go and get another skillet. Edwin went back into the kitchen and got a skillet and came back into the bedroom. The skillet had grease in it. I hit her once with the skillet and grease went everywhere. Edwin took the skillet from me and hit my aunt Beetty in the head too. I don't know how many times because he said I wasn't hitting her hard enough.

Aunt Beetty was barely breathing and Odessa was dead.

We knew we had to get rid of Odessa and my aunt Beetty. I said maybe we could throw them in a vacant lot or something and Edwin said no someone might see us. We decided to put Odessa in a black trunk that was in my aunt's bedroom. Edwin dragged the trunk out of the bedroom and we picked Odessa up and put her in the trunk. There was some clothes and some papers in the trunk. It was a straight lidded black trunk made out of like baseboard. We put like rags and stuff into the trunk from inside the apartment. After we put Odessa and the rags in the trunk we slide the trunk outside and put it in the driveway behind 33B Roosevelt Homes by the trash bend. We went back inside and I asked Edwin what we were going to do with aunt Beetty. He said we could burn her up too like we had planned on burning the trunk with Odessa in it with a bunch of trash. I said that would be too obvious and that we didn't have a trunk or anything to put her in before we burned her up. I told him we could roll her up in some blankets and make it look like a carpet and throw her into some weeds. Edwin picked aunt Beetty up and she was sliding off his shoulders. He had her up over one of his shoulders. He got weak and he dropped her on the floor in the doorway of the bedroom. He told me to get the lawn chair that was sitting in my auntie's bedroom and bring it over to the door so we could put her in it. I took the chair over

to the doorway between the kitchen and the bedroom. I set the chair up, I broke the chair first and then he picked aunt Beetty up and put her in the chair. I went outside and got a clothesline that was hanging up in our yard and came inside and tied aunt Beetty in the lawn chair. Edwin helped me put a loop in the rope but he couldn't tie it tight enough to make the knot stay so I tied it. We had wrapped my aunt in a green blanket and two gold blankets before we tied her in the chair. We looked outside to see if anyone was coming and then we, me and Edwin carried my aunt Beetty to a vacant apartment in the 35 building where she was found. Edwin told me to go to the store and get some lighter fluid. I went over to Bunkum liquor store across the street from the Roosevelt Homes and brought some lighter fluid. I gave Edwin the lighter fluid. When we took my aunt to the vacant apartment we put her inside the closet where there used to be a livingroom. I went back to the liquor store and bought some hefty trash bags, the bags were green and then me and Edwin went back to 33B Roosevelt Homes. We waited for a while and then some time around midnight we went outside and Edwin opened the trunk that Odessa was in and poured lighter fluid into the trunk and used a cigarette lighter to lite the fire. We made sure the fire was lit and then we went into the house. I went inside before Edwin did, into my apartment at 33B. After we set the trunk on fire we gathered all my auntie's clothes and her personal belongings and put them into the plastic bags I had bought. We put Odessa's coat and the skillets into the bags too. We cleaned up the apartment. Me and Edwin got down on our knees and used towels and rags to mop up the blood in the hallway, the bedroom and the kitchen. We used a big old pot for a bucket. It is still at the apartment but the same water in it is not the water we used. We cleaned down the walls in the hallway and the kitchen and then we put all the rags and towels that we used in the trash bags. After we cleaned up the apartment, we went to bed. I couldn't sleep.

The next day that was Thursday, we got up early and then we cleaned up the bedroom. We removed all my aunt's things from the bedroom that day and scrubbed the bedroom floor with sos pads. We put all aunt Beetty's thing in some more of the bags. We threw some of the trash bags out in the ditches on Bunkum road some were thrown in the ditch by the 33 building and then some were thrown in the ditch in the rear of the 33 building by the driveway behind the building. After we threw out some of the trash bags with all the stuff in them, we checked on the trunk. The whole trunk had burned but the upper part of Odessa's body and part of her legs had not burned. We, me and Edwin put on glove regular knit winter gloves, a black pair and a light colored pair and picked up Odessa's body and put it into a brown cardboard box. It was a stereo box from a stereo that we had bought about a week before that. The box was still at the house. Then we set the box out by the trash. We put trash in the box and put trash on top of the box to make it look like trash.

The next day Friday night some time around ten o'clock we started moving furniture out of the apartment. I wasn't strong enough to pick up the furniture so Edwin got his friend Adam Jeffries, I think that is his last name to help him move the furniture. We told Adam that we were moving some of the old furniture out of the apartment. Edwin and Adam moved out the furniture. There was an orange chair, a brown flowered couch and a brown flowered chair the springs and mattress and the trash bags with Odessa and my aunt's clothes in them. The orange chair came out of my auntie's bedroom and so did the spring and mattress. The flowered chair and couch came out of the livingroom. The furniture and the trash bags with the clothes and things were thrown into the same dutches that some of the other bags were thrown into.

Edwin gave me the knives and told me to wash them. I put them into the sink and washed off the blood and

then we put the knives on top of the kitchen cabinets where they are now.

On Saturday we painted the livingroom and threw away old books, maybe just a couple of old books and some trash. Around nine something we got done painting. Edwin said they were having a dance over at the twenty eight building and that no I told him that they were having a dance and asked him if we could go to the dance and he said no that we knew what we had to do. He was talking about burning up my aunt Beetty that was still wrapped up in the closet in the vacant apartment of the 35 building.

We cleaned up the livingroom floor, the paint off the floor with terpentine and Fantasy Island was on t.v. so that had to be some time around ten p.m. After we cleaned the paint off the floor he left our apartment and said he was going to walk around and see if anyone was looking. He said he was going to go over to the vacant apartment where aunt Beetty was and burn her up. Edwin took the rest of the lighter fluid from my apartment that I had bought from the liquor store and left the apartment.

About a half an hour later he came back to my house and said he had set aunt Beetty on fire and that when he walked back by that someone was over in side the vacant apartment. He said he thought that someone had called the police and the fire department. We got on our coats and left my apartment and went over to Edwin's mother's house. Edwin's sister Ida Thomas and her boyfriend Calvin Williams were at my apartment in the bedroom watching television when me and Edwin left the house. They were there when we were cleaning up the paint but they didn't know anything about what had happened or where Edwin was going when he left to go set the fire.

The knives and I think there is one pair of the gloves that we used to pick up Odessa are still at the house at 33B Roosevelt. I think Edwin took the black gloves with him. All the other things should be in the ditches. I

didn't see any trash around the homes, I think they must have picked up the trash on Sunday, I didn't notice the box or any trash outside. There are still some bags with clothing and things in them inside of the apartment we were going to throw them away today. We didn't work on the apartment Sunday at all we went down to Edwin's other's house at 450 Roosevelt Homes.

I don't know anything about Odessa's purse, I thought it had been burned up with some of the other things.

There is something else after I stabbed my aunt Beetty she kept talking so I took a piece of a white blouse that I had torn and put it around her her mouth like a gag.

Me, and Edwin had talked about stoping aunt Mattie from harassing me before. She would come in drunk or would get on the phone and tell people that I never did anything for her that I wouldn't give her anything to eat, or anything since I had a boyfriend. I was concerned, about my auntie, she was sick and she would go to the hospital, I would take her and go and visit her and take care of all of her business. In January she went to the hospital she told me she had pneumonia and that they wanted to run a light down into her lungs to see what was wrong with her but she wouldn't let them do the test. They wanted me at the hospital to sign some forms to have it done but she wouldn't let me sign the papers. I was always doing everything for her. Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that when he began talking about doing something to aunt Beetty but he never said what. Odessa was always jumping up in my face and one time about a month ago me and Odessa got into an argument about my dress that I let Odessa use and Edwin seen her get in my face that time. He, Edwin just couldn't stand to see my auntie or Odessa harass me anymore. Things just kept adding up and adding up and the night that we killed Odessa and my aunt Beetty Edwin just couldn't take anymore.

There is one other thing I told you that when I stabbed my aunt that I remember stabbing her in the chest but I could have stabbed her in the back too because I had my eyes closed like I told you. I didn't stab or hit Odessa at all, only Edwin did that, but Edwin did hit aunt Beetty with the skillet he didn't stab her. I was the only one that stabbed her. I stabbed her with my left hand, I'm left handed.

Another thing when Odessa fell on th floor after Edwin stabbed her she must have fallen against my bicycle, it is a blue ten speed twenty six inch bike, the brandname is Protour that was sitting in the hallway because there was blood all over it. I tried to wipe the blood off of it that night. I got as much of the blood off as I could.

This is all that I know and what I told you is the truth as best I can remember.

/s/ Millie R. Lee

Time Completed: 12:00 P.M.

/s/ Det. Sgt. L.C. Moore #058
Witness

/s/ Det. S. Muckensturm #143
Witness

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

PEOPLE'S EXHIBIT NO. 40
INTRODUCED INTO EVIDENCE AT TRIAL
STATEMENT BY MILLIE R. LEE ON FEBRUARY 17, 1982

DEPARTMENT OF POLICE
EAST ST. LOUIS, ILLINOIS

STATEMENT

I, Millie Renee Lee, have been advised by Det. L. Stewart an East St. Louis Police Officer that I have a right to remain silent and that I do not have to make any statement, answer any questions or talk to anyone nor answer any question directed to me; I have further been advised that anything I say or any statement I give can and will be introduced into evidence in Court against me; I have been further advised that if I want an attorney to be present at this time or anytime thereafter, I am entitled to such attorney, and that if I cannot afford to pay for an attorney that an attorney will be furnished to me if I so desire, and that if I do desire an attorney I do not have to make any statement or answer any questions until such time as an attorney has consulted with me.

Having been advised of these rights as above, I hereby voluntarily agree to make a statement, to answer questions asked of me and I waive my right to have an attorney as above set forth. I further state that I have not been threatened or mistreated in any fashion nor have any promises of leniency been made to me in return for making this statement.

/s/ Millie R. Lee

/s/ Det. L. Stewart
Witness

I am 18 years of age, born June 02, 1963 at East St. Louis, Ill. I am employed as a Unemployed by the N/A Student State Community College, ESL, Il. I reside at 33 B Roosevelt Hm Apts. or Apt. 506 E-2 Bldg. Orr-Weather Apts., ESL, Il. Married No Single Yes Home telephone 875-6004 Mother's Business telephone 271-0393

In regard to the statement that I gave Det. Sandra Muckensturn on Mon. Feb. 15, 1982 at approximately 8:00 PM, I told her that the incident involving Odessa Harris and Mattie Darden in which they were killed occurred on Wed., Feb. 10, 1982. However, upon your re-interviewing me, I recall that it couldn't have happened on Wed. Feb. 10, 1982 like I said, because, I watched the Television show "Dynasty" and after it went off nothing occurred. Therefore, it had to have happened on Thur., Feb. 11, 1982 at approximately 10:00 or 10:30 PM between those hours.

I also recall purchasing the Charcoal lighter fluid on Thur., Feb. 11, 1982 at approximately 11:00 PM. After purchasing the Lighter Fluid, I went back to the same store, which was the Bunkum Rd. Liquor Store and purchased a box of Hefty Trash Bags. They were dark green in color.

The above statement has been given to Det. L. Stewart without my being threatened or promised in anything in return for giving it. I have read the above statement and find it to be true as I gave it to him. End of Statement.

/s/ Det. L. Stewart
Witness

/s/ Millie R. Lee

Time Completed: 1:40 PM.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

PEOPLE'S EXHIBIT NO. 24
INTRODUCED INTO EVIDENCE AT TRIAL
STATEMENT BY EDWIN R. THOMAS ON
FEBRUARY 16, 1982

DEPARTMENT OF POLICE
EAST ST. LOUIS, ILLINOIS

STATEMENT

I, Edwin Renordo Thomas, have been advised by Det. Sgt. L.C. Moore East St. Louis P.D. that I have a right to remain silent and that I do not have to make any statement, answer any questions or talk to anyone nor answer any question directed to me; I have further been advised that anything I say or any statement I give can and will be introduced into evidence in Court against me; I have been further advised that if I want an attorney to be present at this time or anytime hereafter, I am entitled to such attorney, and that if I cannot afford to pay for an attorney that an attorney will be furnished to me if I so desire, and that if I do desire an attorney I do not have to make any statement or answer any questions until such time as an attorney has consulted with me.

Having been advised of these rights as above, I hereby voluntarily agree to make a statement, to answer questions asked of me and I waive my right to have an attorney as above set forth. I further state that I have not been threatened or mistreated in any fashion nor have any promises of leniency been made to me in return for making this statement.

/s/ Edwin R. Thomas

/s/ Det. Sgt. L.C. Moore
Witness

/s/ Det. S. Muckensturm #143
Witness

I am 19 years of age, born Oct. 25, 1962 at St. Louis, Mo. I am employed as a N/A by the ————————. I reside at 45-C Roosevelt Hms East St. Louis, Illinois. Married no Single yes. Home telephone 271-4925 Business telephone ————————

On Wednesday, 02/10/82 approximately between 7pm-8pm I was at 33-B Roosevelt Hms. this is where my girl friend, Millie "Renee" Lee, (18) her Aunt, Mattie Darden, and Marcus Montez Lee, her baby son live at.

This is about the time, Aunt Beedie came home with Odessa and Renee had asked Odessa how did they get home? and Odessa told her in a cab. I was sitting in the living room watching television, and Renee was also. I don't remember what we were watching. Odessa and Aunt Beedie went into Aunt Beedie's room. I stayed there for a short while, then I left and went to my Mother's house, 45-C Roosevelt Hms. I went home, because my Mother had called me earlier, so she could look at my jaw, because I had a infected tooth. Approximately fifteen minutes later, I returned back at Renee's house, and we got into a arguement. because I had gone to my Mother's house. We always would have arguements about visiting our parents. because my Mother lived close, and Renee's Mother lived in the Orr-Weathers Apt. She would get mad because I would would not let her go, after it got late.

During the course of our arguement, Odessa heard us because Renee was getting loud, and Odessa Came into the kitchen where we were, and asked, "what's the hell going on?" this is when Odessa and "Renee" began to exchange words with one another. After a short while, Odessa returned back to Aunt Beedie's room, this is when I told Renee "every time they get drunk, they start calling Renee names." This is when I asked Renee, "did she still want to go through with it?" I was refering to what we had plained before about killing Aunt Beedie. We had talked about doing something to Aunt Beedie, but we had not figure out just what we would do. We had

never before discussed doing anything to Odessa just Aunt Beedie, because we were tired of Aunt Beedie getting drunk, and coming home and "going-off" on Renee. I mean cursing, calling "Bitches" "whores," and on one occasion I heard her tell Renee, "I will kill you". Aunt Beedie would get mad because we use to keep the baby on the pot, I was trying to train him to use the pot, because he usually wet the bed every morning, if we did not get him up in time. While Odessa was back in the room with Aunt Beedie. After asking Renee, "did she still want to do it?" Renee first gave me a funny look, as though she was not going to do it, she stared into space for awhile, then she looked at me and said, "yes".

We decided that if we did something to Aunt Beedie, we had to do somthing with Odessa. We wanted Odessa to leave, but she stayed there. We had plained that Renee was suppose to get Odessa to stand, with her back toward the front room, looking into the kitchen, while I would grab her from the back, using the big knife, stabing her in back, because Odessa was strong. Renee had told be before how strong Odessa was, and that she had killed someone before. I had got the knife from out of the kitchen, from out of a bucket, where all the spoons, knives, and forks are kept on top of the sink.

I took the knife into the front room, and sit on the arm of recliner chair, placing the knife in the seat of the chair. Renee was on her way to get Odessa by this time, from Aunt Beedie's room. I also remember askig Renee prior to her going to get Odessa, "was she scared?" and she said "yes", but I going to do. I dont remember if Aunt Beedie's bedroom door was open or shut, because I was seated on the arm of the recliner chair, and from this angle I was not able to see Aunt Beedie's door, because her room is located on the South/East corner of the apartment. We had waited a long time for Odessa to leave, but she never left, so this is when we knew that we had to "do it". I remember hearing Renee calling Odessa, saying, "come here, I've got something to

ask you". Renee backed up in the hall-way into the kitchen, I heard Odessa before I seen her. This is when I seen Odessa going into the kitchen, there were some curtains up to the kitchen entrance, (no door) I open the curtains to see if her back was toward me. When I seen her back turned, I reached into the chair for knife. When I entered between the curtains, I saw Odessa had turned her head around, and saw me coming. She turned around and grabbed me. I had the knife in my right hand. Odessa grabbed both of my wrists. I then placed my left foot behind her left leg, and fliped her to the kitchen floor. The kitchen table had got knocked over by this time, while she was laying on her back on the floor, I got down on on-top of her and put my right knee on her left arm forcing her to release my right wrist. I stabbed her once, with the big knife, and she started calling for Renee's Aunt. She was calling, "Aunt Beedie, "Aunt Beedie" I remember stabbing her in the left side of her chest area. I dropped the big knife and grabbed the little knife which was at this time, fallen to the floor when the table turned over, I then stabbed her again, but a little lower than the first wound. I stabbed her again in the chest, a total of three times. once with the big knife, and twice with the little knife. during the times I was stabbing her which I had the knife in my right hand I recall hearing her saying. "The Lord Ain't going to to let me die". I also recall she started to talking when I got when I got the second knife, and I got scared because the way she said. "the Lord ain't going to let me die". she was shaking her head back and forth while she said it. I also remember that the reason I got the little (second knife) was because the big knife. it had bent, the big knife had a small amount of blood on blade, there was no blood on neither handle. I told Renee that she had to keep her Aunt Beedie quiet, because the neighbors might hear her, I had gotten off top her Aunt and started toward Her Aunt's room. I handed Renee the little knife. I never seen Renee stab

her Aunt with the /any knife. While still standing there in the kitchen Renee asked me for hammer, I told her that I didn't know where the hammer was, Renee told me to look inside the cabinet and get a old skillet, I recall going into the room, handing her the old rusty skillet, I think Renee hit her Aunt twice with the skillet and the old skillet broke into several pieces. I walked back into the kitchen and got another skillet, which I took from off the stove which had some greese inside it. I handed it to Renee, and she hit her Aunt One time. and the second time Renee missed and hit the couch, Renee handed the skillet to me, after I told Renee that she was not hitting her Aunt hard enough. At this time I hit at Aunt Beedie, I had the skillet my right hand. Im not sure if I struck her or not, because Aunt Beedie was laying on the floor on her left side, with her back against the couch, and her lower part against the bed. The head of the bed, and the back of the couch is against the South wall, the bed being positioned against the East wall, making the bed and cough shaped "L". Due to the position she was laying, made it very difficult to hit her. I dont recall how many time I struck her. The greese that was in the skillet, had spilled mostly on the right side of the couch. I later recalled going to the hall bathroom, where I washed the blood off both of my arms. Also I forgot to mention that Renee and I had put on gloves before the killings took place. I remember telling Renee to put her gloves on, we had gloves on during the entire thing. I had on a pair of black, regular kind like scarffs are made out of, and Renee had on a pair of beige glove, same kind of material. We later went into the front room and decided what we were going to do with both bodies. We both looked through the house to see what we could find that was big enough to put both bodies in, the only thing that we could find big was a trunk, a black trunk, square top with old clothes and paper inside of it. this was inside Aunt Beedie's room. Renee's idea was to wrap Aunt Beedie in the two gold

blankets and the one reeen blanket that were on the bed, that she had gotten blood on, then dump her her on the other side of the Roosevelt homes where all that garbage was. I told her, "no", because someone would find her. We first put Odessa inside the trunk, and put on old matress cover on top of her we took off the clothes that we had on, I didn't have any blood on me except the old blue jeans that I played football in, I took off the blue jeans and put on another pair black pants, these are the same pants that I have on now. I also washed these rubber boots that I have on now, there was not that much on them, except for the blood stuck in the cracks under the bottom. I check my shirt for blood, but there was none on it. Renee had blood on her jeans, I told her. there was blood all over the floor, in the kitchen, and blood in one spot in Aunt Beedie's bedroom around the couch. I for got I took the gloves off to get the blood off my arms. then I put the gloves back on. I decided to burn the bodies, so I sent Renee to the Bunkum Liquor store for some trash bags, She said she would get somthing that would burn, I asked her, what? she said lighter fluid, I said "ok", but hurry back. while she was gone, I was standing in the front room waiting for her to come back. I was scared, because somebody usually would come knock on the door, looking for Renee, some of her friends. I forgot to mention Aunt Beedie usually kept the television up loud, because she was hard hearing. I turned the television down before Renee left. I dont think anyone in the apartments on each side of us heard anything because the lady in apartment # 33-A usually call when Me and Renee are arg eing loud, and ask, "what going on over there?" and she had not called. I guess it was about 11:00 p.m. or close to 12:00 a.m. because the liquor store was about to close. usually when it time to close they turn the outside lights off, and I remember looking out side seeing the outside lights off. Also the clock in Aunt Beedie's room a clock and radio combined, never kept the right

time. I forgot to mention that we had carried the wood trunk into the kitchen, and loaded Odessa, before Renee left It didn't take Renee long to go to the store. After she got back we turned off the light in the kitchen, and slid the trunk out side the back door. I don't remember the name of it, the lighter fluid, but it was a new can. After we got the trunk outside, we slid the trunk to the trash can, it was close to the door. We both went back inside, Renee stayed inside, I got the lighter fluid off the sink and went back outside, open up the trunk, sprinkle lighter fluid inside the trunk only, because if I had put any out side it would have been a big blaze, and some one might have seen it. I lit the mattresscover, which we had used to cover her up in, then I closed the top of the wood trunk. I wentside and asked Renee what were we going to do with her Aunt's body, she finally suggested we take her to the empty apartment, the one that is off the right of her rear door, I dont know the apartment number. We had been looking out side the rear door window, and at times I would come outside and look around to see if any one was looking. Later Aunt Beedie was wrapped in the three blankets, and at one time I tried to carry her out on my shoulder, but she was too heavy, and I dropped her back on the bed, where we had picked her up and laid her off the floor, before wrapping her up in the blankets.

I look around and saw a long aluminum lawn chair in her Aunt's closet, and told Renee that we could slide her out,

Renee said, "if we put her in ther right we could carry her out".

After we had put her in the chair Renee tied her down with some cloth line ropes that she had went outside and cut down.

Renee looked out the back door to see if anyone was looking or looking out the windows, then I went outside and looked, after not seeing anyone, we carried her to the vacant apartment. As we were carrying her, Renee

walked over into the deep snow, and I fell into the snow. Part of Aunt Beedie body slipped out of the chair, so I told Renee to "hold up" I was tired from walking in the deep snow. I took several breaths, and then we picked her back up and started again. by the time we got to the rear door, we fell again, Renee was up front and I was carrying the rear. Renee fell in front of the door, and I fell outside the door. We slid the chair inside the apartment which was not boarded up. The light from the street was shining into the apartment, because there were no windows boarded up. and we were able to see where we were going. We took the chair into the front room and put it inside the closet, and tried to close the closet door, but it would not close. We close as far as we could then we left out. When we got back to the apartment I noticed that the fire had gone out, we went inside and picked up the table, and then cleaned up the apartment, by scrubbing the floors with SOS pads then moped them. after cleaning up the apartment. I forgot, we changed our clothes after we had gotten rid of both bodies, and clean up the apartment. We put our pants inside the trunk and then put some bags filled with trash on top of the trunk, put more lighter fluid on them and I lit the fire again. I continued through-out the night watching the fire burn. Early thursday morning, I went outside and put the remains of the body inside a brown cardboard box, which we gotten a stereo set in, and filled it up with more trash from inside the house and left it there for the trash haulers. Later Saturday night, on February 13, 1982 I acting alone, approximately 10:00pm or 10:30pm went to the vacant apartment, with a can of lighter fluid, where I sprayed the body of Aunt Beedie's and lit her on fire. I later went to my Mother's apartment, 45-C Roosevelt Hms. to have a excuse where I had been in case anyone inquired at to where I was.

I have given this statement, which consist of 11 pages, which I have been allowed to read for corrections, which after I find to be true to the best of my knowledge.

Note . . . We both put the remains of the body inside the cardboard box. E.R.T.

End Of Statement.....

/s/ Edwin R. Thomas

Time Completed: 8:00 AM.

/s/ Det Sgt LC Moore #058
Witness

/s/ Det S. Muchensturm #143
Witness

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FINDING OF THE HONORABLE JOHN J. HOBAN

[R.237] THE COURT: I followed this case very closely, since its inception here in court yesterday. I have taken voluminous notes, which is unusual for me, as to the testimony of the various witnesses. I have reviewed those notes last night, again today. I reviewed the confession of both of them. I feel first that the confessions were voluntary, voluntarily given, and that they were corroborated by other evidence which led the police to make findings which substantiated the accuracy of the confessions and the authenticity of the counts set forth [R.238] therein. As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is resulted from a sudden and intense passion, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could come out. Now that isn't a sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, she expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. The both acted in the

disposition of the bodies. They both acted in the covering up of evidence that a crime had been committed, and both of them acted apparently without any compassion at all for their two victims. They beat them, stabbed them, burned them, and treated them, human beings, with no more than, their body, with their mortal [R.239] remains, then they would respect for the trash that was permitted to gather behind the Gompers or behind the apartment complex wherein the crime took place.

I feel that the State has proved beyond a reasonable doubt that the defendants Renee Lee, and her co-defendant Thomas were both guilty of the crime of Murder of Odessa Harris, and I find that they were guilty of the crime of Murder of Mattie Darden.

I've been a severe critic of the East St. Louis Police on many occasions. I think on this instance they did a very good job, a remarkable job of work. They're to be commended for it. The State is to be commended for putting together this maze of scientific evidence which resulted in Dr. Murphy's testimony that he revolved the fragment of bond under x-ray machines until it matched perfectly, and he could say 99 per cent, he wouldn't say 100 per cent, 99 per cent sure that it was from the body of Odessa Harris. I think that's quite striking, and I think that's the way cases should be investigated and presented. And I commend Mr. Hudlin for his presentation of the case, and the defendants for what they had to work with. The Court finds both defendants guilty of both Murders. I don't think there was a bond set in either case. If there was a bond set, both bonds are revoked. Court stands in recess.

COURT ADJOURNED:

STATE OF ILLINOIS
IN THE CIRCUIT COURT
OF THE 20TH JUDICIAL CIRCUIT
ST. CLAIR COUNTY

MITTIMUS FOR STATE PENAL INSTITUTIONS

PLEAS before said Circuit Court held in the city of Belleville, Illinois on September 7, 1982.

Present: HONORABLE JOHN J. HOBAN, Judge of the Circuit Court; JOHN BARICEVIC, State's Attorney; RAY HERR, Sheriff.

Attest: C. Barney Metz
(Clerk of the Circuit Court)

BE IT REMEMBERED that on said date the following, among other proceedings, were had and entered of record in said Court:

No. 82-CF-94

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

MILLIE LEE, DEFENDANT

JUDGMENT AND SENTENCE

Now come THE PEOPLE OF THE STATE OF ILLINOIS, by Mr. Richard Hudlin, Asst. State's Attorney of St. Clair County, and the defendant, in person and by counsel, Ms. Ann Hatch, Asst. Public Defender, and now

neither the defendant nor defendant's counsel saying anything further why the judgment of the court should not now be pronounced against said defendant on the finding of guilty heretofore entered to the charge of Murder (2 counts) as charged in the complaint or indictment returned in this cause on April 16, 1982;

Therefore, it is ordered and adjudged by the court that said defendant is guilty of the crime of Murder (2 counts) as charged in the indictment or complaint herein.

The court finds the age of said defendant to be —— years.

The court having offered to hear evidence in aggravation and mitigation of the offense as to the moral character, life, family, occupation, and criminal record of defendant, and the presentation of evidence having been heard by the court ——————————————
the defendant having nothing further to say, the court hereby sentences said defendant to imprisonment in a penitentiary and fixes the term of imprisonment at Count I—Natural Life, Count II—forty (40) years—sentences to run concurrently.

It is further ordered and adjudged that the defendant be taken from the bar of this court to the common jail of said county, and from there be taken by the sheriff of said county to the Department of Corrections and be delivered to the Department of Corrections, and said Department of Corrections is hereby commanded to confine the defendant for the term above fixed, or until discharged by due process of law.

It is further ordered that said defendant pay the costs of these proceedings and that a mittimus be issued and executed without delay.

Dated September 8, 1982

ENTER:

/s/ John J. Hoban
(Judge)

STATE OF ILLINOIS,)
) ss.
ST. CLAIR COUNTY,)

The undersigned Clerk of the Circuit Court of the above named Court does hereby certify the above to be a true and complete copy of an order entered of record in said Court in the case of THE PEOPLE OF THE STATE OF ILLINOIS versus MILLIE LEE 82-CF-94

Signed and sealed before me
September 8, 1982.

C. Barney Metz By: /s/ Sheri Rayfield
(Clerk of the Circuit Court)

(Official Seal Affixed)

To the Sheriff of St. Clair County to Execute

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-82-539

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

MILLIE R. LEE, DEFENDANT-APPELLANT

Appeal from the Circuit Court
of St. Clair County

Honorable John J. Hoban,
Judge Presiding

WELCH, J.,

ORDER

Filed December 7, 1984

Defendant, Millie R. Lee, was indicted on two counts of murder (Ill.Rev.Stat. 1981, ch. 38, par. 9-1(a)(1).) Following a bench trial in the circuit court of St. Clair County, she was found guilty as charged. Defendant was sentenced to a term of 40 years imprisonment for the murder of Odessa Harris and a term of natural life imprisonment for the murder of Mattie Darden. Defendant appeals. We affirm.

The pertinent facts as stated in defendant Lee's and codefendant Thomas' confessions are as follows:

On February 11, 1982, the defendant and her boyfriend, codefendant Edwin R. Thomas, were at the apartment she shared with her aunt, Mattie Darden. Darden returned to the apartment with Odessa Harris. Harris and Darden went into the bedroom. Later, the defendant

and codefendant became involved in an argument in the kitchen, and Harris came into the kitchen to see what was going on. The defendant and Harris became involved in a verbal argument, and Harris returned to the bedroom. The defendant then called Harris out of Darden's bedroom, ostensibly for the purpose of asking Harris if Darden had paid the rent. As Harris was walking back through the living room, codefendant Thomas stabbed her. Harris began to call to Darden. The defendant then ran into the bedroom and found Darden armed with a knife. Defendant went to the kitchen, where she obtained a butcher knife, and then returned to the bedroom, where she stabbed Darden numerous times. Defendant then asked codefendant Thomas for a hammer to knock Darden unconscious. Codefendant Thomas returned with a cast iron skillet, which defendant used to strike Darden on the head. The skillet broke, so the defendant sent codefendant Thomas back into the kitchen for another skillet. After he returned with it, she again hit Darden on the head. When told by codefendant Thomas that she was not hitting Darden hard enough to do any damage, the defendant allowed codefendant Thomas to take over, and he struck Darden a couple more times on the head with the skillet. They then put Harris' body in a trunk and put the trunk near the trash in an alley behind the apartment. They wrapped Darden's body in a couple of blankets, carried it to a nearby vacant apartment, and placed the body in the closet in the living room. The defendant then went to Bunkum Road Liquor Store and purchased a can of lighter fluid. At approximately midnight, codefendant Thomas poured lighter fluid on the body of Odessa Harris and set it on fire. They then began cleaning up the apartment.

The next day they checked the trunk and discovered that the upper part of Harris' body had not burned. They then placed her remains in a cardboard stereo box that they set out with the trash.

On Saturday, February 13, 1982, codefendant Thomas went back to the vacant apartment with the can of lighter

fluid to burn Darden's body. Codefendant Thomas returned to the defendant's apartment and told the defendant he had set the body on fire.

A neighbor, Lily Williams, was informed at about 11:30 p.m., February 13, 1982, that there was a fire in a vacant apartment next door. She went next door and put the fire out while one of her sons contacted the fire department. Captain Lavester Heavens of the fire department arrived and, while investigating the fire, found the body. He then called the East St. Louis Police Department.

Detective Brinkley stated that further investigation led the police to the defendant's apartment. On February 15, 1982, the defendant was questioned there by members of the East St. Louis Police Department, and she agreed to accompany them to the police station to try to identify the body. At the police station, the defendant started crying and was given her Miranda rights. The defendant then gave a detailed account of the murder in an oral statement that clarified the events that occurred on and after February 11, 1982. The oral statement was subsequently reduced to an 11-page typewritten statement that was signed by the defendant on February 15, 1982. On February 17, 1982, the defendant gave another statement, which in essence corrected the date she had given the police in her original statement. On February 16, 1982, codefendant Thomas gave the police a strikingly similar detailed account of the murders in an 11-page typewritten statement.

Before trial, defendant filed a motion to suppress her confession for a variety of reasons, among them that the statement was induced by promises of leniency. This motion did not specify the identity of all the officers involved but named Detective Sgt. L. C. Moore, Detective Carl Brinkley, Detective Ezell, Detective S. Muckensturm, and Detective Walker. The motion was taken with the case and denied.

The first issue is whether the trial court improperly considered codefendant Thomas' confession against the

defendant. In *Bruton v. United States* (1968), 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, the United States Supreme Court held that admission of a codefendant's extrajudicial statement that inculpates the other defendant violates the defendant's Sixth Amendment right to confront witnesses against him. Defendant argues the *Bruton* rule was violated when the trial judge rejected the contention that voluntary manslaughter resulting from sudden and intense passion occurred here. The following statement was made:

> "THE COURT: As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is resulted from a sudden and intense passion, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to stabbing, according to his own confession, the defendant [Thomas] took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant [Lee] call her so she could come out. Now that isn't a sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, she expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. They both acted in the covering up of evidence that a crime had been committed, and both of them acted apparently without any compassion at all for their victims.
>
> * * *"

Although the judge did consider codefendant Thomas' confession, it is evident from the record that he considered the defendant's confession as well. Defendant's statement reveals her attack on Darden was not the result of self-defense, for after she had left Darden's bedroom originally there was no need for her to return to the bedroom. Furthermore, defendant alluded to a plan in her own confession, where she stated:

> "LEE: Me, and Edwin [sic] had talked about stopping aunt Mattie from harassing me before. * * *"

It is well settled that a substantial difference exists between the *Bruton* rule and the interlocking confession situation. In the former situation, a jury hears only the codefendant's statement incriminating the defendant who has himself made no admissions whatsoever, whereas in the latter situation, the jury hears a codefendant's statement incriminating the defendant who has himself made similar inculpatory admissions. When the interlocking admissions are inculpatory, the admission of codefendant's incriminating statement against defendant does not fall within the *Bruton* rule. Hence defendant's first argument fails. *People v. Bassett* (1974), 56 Ill.2d 285, 307 N.E.2d 359, 365; *People v. Rosochacki* (1969), 41 Ill.2d 483, 244 N.E.2d 136, 141-42.

The defendant next argues that the State failed to prove that defendant's statements to the police were voluntarily given. Defendant argues that (1) the statements were induced by promises of leniency, and (2) the State failed to present all material witnesses to the taking of the statements, despite defendant's timely demand.

The defendant answered in the affirmative when defense counsel asked if Officer L. C. Moore or Detective Brinkley ever indicated that things would go easier for her if she talked with them. The defendant also indicated that Detective Muckensturm said "it would be best

if I [defendant] got it off my chest." Detectives Moore, Brinkley, Muckensturm and Stewart, and Officer Detloff, each testified that they participated in or were present during the taking of defendant's statements. Detective Muckensturm stated in her testimony that Detective Alva Busch was present during a part of the first statement. During closing argument. defense argued that Detective Busch should also have been presented for questioning.

The finding of the trial court that the statement was voluntary will not be disturbed unless it is contrary to the manifest weight of the evidence. (*People v. Prim* (1972), 53 Ill.2d 62, 70, 289 N.E.2d 601, *cert. denied* (1973), 412 U.S. 918, 37 L.Ed.2d 144, 93 S.Ct. 2731.) Assuming that the trial court believed defendant's testimony regarding the alleged promises of leniency, the statements were not thereby rendered involuntary. A comparison of defendant's testimony with the facts in numerous other cases indicates that even if her testimony were believed, the police conduct therein described did not destroy the voluntary nature of her statements. (*People v. Stevens* (1st Dist. 1981), 98 Ill.App.3d 158, 165-66, 423 N.E.2d 1340, 1346; *People v. McGuire* (1968), 39 Ill.2d 244, 234 N.E.2d 772, 775, *cert. denied* (1968), 393 U.S. 884, 21 L.Ed.2d 160, 89 S.Ct. 193; *People v. Hartgraves* (1964), 31 Ill.2d 375, 202 N.E.2d 33, 36, *cert. denied* (1965), 380 U.S. 961, 14 L.Ed.2d 152, 85 S.Ct. 1104.) Also, case law firmly establishes that mere exhortations to tell the truth or to make a statement do not render inadmissible a subsequent confession. *People v. Wipfler* (1977), 68 Ill.2d 158, 368 N.E.2d 870, 876; *People v. Noe* (3rd Dist. 1980), 86 Ill.App.3d 762, 765, 408 N.E.2d 483, 485.

Accordingly, since no material question of fact was before the court, Detective Busch need not have been presented to confirm or deny the truth of the defendant's contentions, and the court did not err in finding her statements voluntary.

Finally, the defendant requests that the sentence of natural life imprisonment be vacated because the judge did not recognize that a sentence of natural life was not mandatory.

The defendant argues that the judge sentenced her under section 5-8-1(a)(1)(c) of the Unified Code of Corrections (Ill.Rev.Stat. 1981, ch. 38, par. 1005-8-1(a)(1)(c)), which states that

> "if the defendant has previously been convicted of murder under any state or federal law or is found guilty of murdering more than one victim, the court shall sentence the defendant to a term of natural life imprisonment * * *."

In *People v. Taylor* (1983), 115 Ill.App.3d 621, 630, 450 N.E.2d 1256, 1263, *rev'd in part* (1984), 102 Ill.2d 201, 464 N.E.2d 1059, the appellate court held that the word "shall" in section 5-8-1(a)(1)(c) was permissive rather than mandatory. However our supreme court reversed in part the findings of the appellate court in *People v. Taylor*. The court held that a mandatory minimum penalty of natural life does not violate section 11, article I of the Constitution of Illinois of 1970, which provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." (*People v. Taylor* (1984), 102 Ill.2d 201, 464 N.E.2d 1059, 1061.) The court further found that only a statute that unduly infringes on judicial authority violates the separation of powers clause of the Constitution of Illinois (Ill.Const. 1970, art. II, sec. 1) and that the provisions in section 5-8-1-(a)(1)(c) do not unduly infringe upon the judicial power, and are mandatory. *People v. Taylor* (1984), 102 Ill.2d 201, 464 N.E.2d 1059, 1064.

Further, the trial court's comments support the conclusion that the court found the murders exceptionally brutal and heinous under section 5-8-1(a)(1)(b) (Ill. Rev.Stat. 1981, ch. 38, par. 1005-8-1(a)(1)(b)), which also permits a sentence of natural life.

The instant sentence was warranted by the evidence of the offenses. The power to impose sentence is exclusively a function of the judiciary. (*People v. Davis* (1982), 93 Ill.2d 155, 161, 442 N.E.2d 855, 857.) It is a matter of judicial discretion, and absent an abuse of this discretion the sentence of the trial court may not be altered on review. *People v. Perruquet* (1977), 68 Ill.2d 149, 368 N.E.2d 882, 884.

For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed.

AFFIRMED.

KARNS and HARRISON, JJ., CONCUR.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 82706
(217) 782-2035

April 2, 1985

State Appellate Defender
Fifth Judicial District
P.O. Box 2430, Route 15 East
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No. 61304—People State of Illinois, respondent, v. Millie R. Lee, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 23, 1985.

SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO the Appellate Court of the State of Illinois, Fifth District

---

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

July 1, 1985

Supreme Court, U.S.
FILED
AUG 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-6807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILLIE R. LEE,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari
To The Appellate Court of Illinois
Fifth Judicial District

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the petitioner's sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of the inculpatory confession of her nontestifying co-defendant as substantive evidence of her guilt?

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People v. *Lee*, No. 5-82-539 (Ill. App. Ct. 5th Dist. December 7, 1984).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner invoked the jurisdiction of This Honorable Court under the provisions of 28 U.S.C. § 1257(3) and sought a writ of certiorari based on a "right . . . claimed under the Constitution." Her petition for the writ was filed within sixty days of the Illinois Supreme Court's Order which denied her timely petition for leave to appeal the judgment of the Appellate Court of Illinois, Fifth Judicial District, as mandated by Rule 20.1 of This Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

* * *

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On April 16, 1982, a bill of indictment was returned by the grand jury of St. Clair County, Illinois, charging the petitioner Millie Lee and Edwin Thomas with the murders of Mattie Darden and Odessa Harris. (J.A. 2, 3) Petitioner and Edwin Thomas were jointly tried before the bench, without a jury, in the St. Clair County Circuit Court on July 7-8, 1982.

On February 13, 1982, a fireman who had responded to the report of a fire, discovered a body in the closet of apartment 35B of the Roosevelt Homes in East St. Louis, Illinois. He also discovered a can of charcoal lighter fluid on the floor by the closet. (R.13-16) The body had been burned and had a number of stab wounds. (R.19-21) A purse containing the identification of Odessa Donahue was found by the police approximately one hundred feet south of apartment 35B. (R.26,140,166) Police began a search to locate Odessa Donahue. (R.166-67) Their investigation led them to the petitioner's apartment, apartment 33B in the Roosevelt Homes. (R.167-70)

On February 15, 1982, several East St. Louis detectives went to the petitioner's apartment. (R.100,170) They were invited into the apartment and noticed that furniture had been moved around, walls had been painted, and a mop and bucket were visible. (R.102,173) The petitioner informed the police that she did not know the whereabouts of Odessa Donahue, also known as Odessa Harris. (R.102,172) The petitioner stated that the apartment was Mattie Darden's, her aunt, who was out of town

visiting relatives. Petitioner also stated that she was related to Odessa (Donahue) Harris. (R.103,172) The petitioner agreed to go to the East St. Louis Police Department in order to determine whether she could identify the body discovered in the closet. (R.103,174)

At the East St. Louis Police Department the petitioner was shown several photographs of the body. A detective observed that the petitioner was crying while she was viewing the photographs of the body. He advised petitioner of her rights under *Miranda*. (R.104,175) The petitioner thereafter gave a number of conflicting accounts concerning the whereabouts of Odessa Harris and Mattie Darden. (R.108,178) The petitioner eventually admitted that the body in the closet was that of Mattie Darden and that Odessa Harris was also dead. She admitted that she was involved in the death of Mattie Darden, that Edwin Thomas also was involved, and that Edwin Thomas had killed Odessa Harris. (R.109,179) The police placed the petitioner under arrest, read the petitioner her *Miranda* rights again, and obtained two written statements from her. (R.179-80)

Petitioner's statements related that on Thursday, February 11, 1982, she was with her boyfriend Edwin Thomas at the apartment which she shared with Mattie Darden. Mattie Darden returned to the apartment with Odessa Harris. At one point the petitioner was in the kitchen arguing with Odessa Harris. Mattie Darden was in her bedroom. As Odessa Harris left the kitchen and went into the living room, Edwin Thomas stabbed Odessa Harris. Odessa Harris called for help. The petitioner ran into Mattie Darden's bedroom. Mattie Darden was in the bedroom with a knife and swung the knife at the petitioner. The petitioner ran back into the kitchen, got a knife, and went into the bedroom where she stabbed

Mattie Darden a number of times. The petitioner obtained an iron skillet, and both she and Edwin Thomas struck Mattie Darden with it. They then put Odessa Harris' body in a trunk and put the trunk in an alley behind the apartment. They carried Mattie Darden's body wrapped in a couple of blankets to apartment 35B and placed it in the living room closet.

The petitioner purchased a can of charcoal lighter fluid. Approximately midnight, Edwin Thomas poured lighter fluid on the body of Odessa Harris and set it on fire. On Saturday, February 13, 1982, Edwin Thomas went back to apartment 35B and set on fire the body of Mattie Darden. (J.A. 4-15)

Edwin Thomas was arrested, and he also gave a written statement. (R.113-15,135) However, Mr. Thomas' statement related that the petitioner and he had discussed on prior occasions killing Mattie Darden due to severe personality conflicts between the petitioner, Edwin Thomas, and Mattie Darden. Mr. Thomas' statement also detailed that he and petitioner discussed killing Mattie Darden the evening of February 11, 1982, but that they wanted Odessa Harris to leave. Odessa Harris did not leave and they were forced to kill her also. Mr. Thomas related that he had the petitioner lure Odessa Harris into the kitchen, and he attacked Odessa Harris with a knife. He stabbed her a number of times on the floor of the kitchen, eventually killing her. The petitioner then went into Mattie Darden's bedroom and stabbed Ms. Darden. They then disposed of the bodies as the petitioner had described in her statement. (J.A. 16-24)

The police recovered some charred human bones from the trash can behind the apartment. (R.78-82,181) Dr. William A. Murphy, a specialist in radiology, testified that he was able to determine that the bone fragments were

those of Odessa (Donahue) Harris. (R.153-57) An autopsy determined that Mattie Darden died due to multiple stab wounds to the chest and blunt trauma to the head. (R.77)

Petitioner put forth as her defense that she did not have any prior knowledge that Mr. Thomas was going to kill Odessa Harris, nor did she participate in any way in the killing of Ms. Harris. Consequently, she argued she was not guilty of Ms. Harris' murder. She also argued that she could only be found guilty of the lesser offense of voluntary manslaughter in relation to the death of Mattie Darden, based upon either her unreasonable belief that her act of stabbing Mattie Darden constituted self-defense or that the act was the result of a sudden and intense passion resulting from serious provocation. She contended that there was no prior plan made between her and Mr. Thomas to kill Ms. Darden and that her statement indicated that petitioner was confronted by Ms. Darden holding a knife. (R.232-34)

The trial court found petitioner and Edwin Thomas guilty of the murder of Odessa Harris and Mattie Darden. (R.239) The trial court stated:

> As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passion, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant [Edwin Thomas] took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out.

> Now that isn't sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238)

On September 7, 1982, the petitioner was sentenced for the murder of Odessa Harris to a term of forty years incarceration. For the murder of Mattie Darden the petitioner was sentenced to a term of natural life imprisonment. (J.A. 28)

On appeal to the Appellate Court of Illinois petitioner contended, *inter alia*, that her sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of Mr. Thomas' confession against her. The petitioner contended that under *Bruton* v. *United States*, 391 U.S. 123 (1968), the trial court improperly rejected her defense based upon Mr. Thomas' statement. On December 7, 1984, the Appellate Court of Illinois, Fifth Judicial District, in an unpublished order, rejected her argument. The Appellate Court held that the statements made by petitioner and Mr. Thomas were "interlocking confessions", and therefore did not fall within the *Bruton* rule. Petitioner filed a timely petition for leave to appeal to the Illinois Supreme Court, which was denied on April 2, 1985. This Honorable Court granted a writ of certiorari on July 1, 1985.

SUMMARY OF ARGUMENT

In finding petitioner guilty of murder, the trial court relied upon the nontestifying co-defendant's confession to establish the defendant's prior intent to commit the offense, thus negating her affirmative defense. The court's consideration of the co-defendant's confession

against petitioner violated her sixth and fourteenth amendment right to confront the witnesses against her, since the co-defendant did not testify at trial and petitioner was unable to cross-examine him. The Appellate Court of Illinois' decision that petitioner's and Mr. Thomas' statements are "interlocking confessions" is erroneous. The statements are not "interlocking" in the crucial area of intent to kill.

ARGUMENT

THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER WAS VIOLATED BY THE TRIAL COURT'S CONSIDERATION OF THE NONTESTIFYING CO-DEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE IN DETERMINING PETITIONER'S GUILT.

Among the paramount rights afforded by the Constitution of the United States is the right of an accused to require that the accusers appear before the trier of fact and subject their accusations against him to cross-examination. The sixth amendment of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

U.S. Const. amend. VI. This Honorable Court held in *Pointer* v. *Texas*, 380 U.S. 400 (1965), that the sixth amendment right to confront the witnesses against a defendant is applicable to the states through the fourteenth amendment. The denial of this right "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973), quoting *Berger* v. *California*, 393 U.S. 314, 315 (1969).

An essential element of a fair trial is that the trier of fact consider only relevant and competent evidence in deter-

mining the facts in a case and reaching a verdict against an accused. *See Blumenthal* v. *United States*, 332 U.S. 539 (1947). The sixth amendment right to confront witnesses is one of those enumerated rights of the Constitution available to everyone, without regard to guilt or innocence, to ensure a fair trial. The confrontation clause of the sixth amendment is designed to maintain the integrity of the fact-finding process and procedure at trial. This Honorable Court has noted on numerous occasions that the sixth amendment right of confrontation would be meaningless without the opportunity for cross-examination of the accusers. *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Anderson* v. *United States*, 417 U.S. 211 (1974); *Douglas* v. *Alabama*, 380 U.S. 415 (1965). This Honorable Court in *Davis* v. *Alaska*, stated: "Confrontation means more than being allowed to confront the witness physically. . . . 'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*'." 415 U.S. at 315-16, citing Professor Wigmore at 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940).

In orally pronouncing petitioner guilty of both murders, the trial court, sitting as the trier of fact, stated in response to petitioner's defense:

> As to the contention of the defendant, particularly the *defendant Lee* as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passion, that is *disputed by the statement of her co-defendant*, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, *according to his own confession, the defendant [Edwin Thomas]* took a knife, took it back to the chair where he kept it, and awaited

> the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out. *Now that isn't sudden and intense passion. There was no self-defense* that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238) (emphasis added)

(J.A. 25) The co-defendant did not testify at their joint trial. Petitioner was therefore not able to subject his accusations to cross-examination and was thereby denied her right of confrontation.

Petitioner's defense at trial was two pronged. First, she argued that she did not plan with Mr. Thomas to kill anyone. She argued that her statement indicated that she did not have any prior knowledge that Ms. Harris would be killed by Mr. Thomas; that she did not participate or aid Mr. Thomas in any manner in killing Ms. Harris. Therefore, she could not be found guilty of the murder of Ms. Harris as a direct participant or as being accountable for the actions of Mr. Thomas.[1] Secondly, she argued that her statement indicated that after Mr. Thomas stabbed Ms. Harris she ran into Ms. Darden's bedroom and was confronted by Ms. Darden with a knife. She obtained a knife

---

[1] The Illinois accountability statute provides:

> A person is legally accountable for the conduct of another when:
>
> * * *
>
> (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

Ill. Rev. Stat., 1983, Ch. 38, § 5-2(c). Under Illinois law a person cannot be held accountable for an offense for actions taken by the person after the offense has been completed. *People* v. *Malcolm*, 14 Ill. App. 3d 378, 302 N.E.2d 352 (1st Dist. 1973).

and stabbed Ms. Darden. She concluded that she could not be found guilty of murder, but only of the lesser offense of voluntary manslaughter.[2] Voluntary manslaughter could be based either on the unreasonable belief in the need for her actions in self-defense or on the court's finding that she was acting under a sudden and intense passion resulting from serious provocation. (R.232-34)

In *Bruton* v. *United States*, 391 U.S. 123 (1968), This Honorable Court held that the right of confrontation, the right of cross-examination, is violated at a joint jury trial when a co-defendant's confession inculpating the defendant is admitted into evidence and the co-defendant does not testify. In *Bruton*, Your Honors established that there is too great a danger that the jury cannot follow the instructions of the court not to consider a co-defendant's confession against the defendant.[3] The rule had pre-

---

[2] The Illinois voluntary manslaughter statute states:

> A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.
>
> (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Ill. Rev. Stat., 1983, Ch. 38, § 9-2.

[3] See *Roberts* v. *Russell*, 392 U.S. 293 (1968), applying *Bruton* to the states because "the error 'went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination' of his guilt or innocence." 392 U.S. at 294, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 639 n.20 (1965).

viously been that a proper jury instruction which limited the use of the co-defendant's confession strictly against the co-defendant was proper. 391 U.S. at 135-36; *See Delli Paoli* v. *United States*, 352 U.S. 232 (1957). While Justice White dissented from the disposition made by The Court in overruling *Delli Paoli* in *Bruton*, he agreed that the hearsay statement of the co-defendant was not admissible against Bruton, stating: "As to him it was inadmissible hearsay, a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination. Admitting [the co-defendant's] confession against Bruton would require a new trial unless the error was harmless." 391 U.S. at 138.

Normally a *Bruton* type problem is not presented in a trial before the bench without a jury. Where the record is silent, the court is presumed to know the law and not consider a co-defendant's confession against another defendant, but only consider the competent evidence against each defendant. *Cockrell* v. *Oberhauser*, 413 F.2d 256, 258 (9th Cir. 1969), *cert. denied*, 397 U.S. 994. *See also People* v. *McNeal*, 56 Ill. App. 3d 132, 371 N.E.2d 926, 931-32 (1st Dist. 1977). However, this record is not silent and it is clear from this record that the trial court did consider such improper evidence against the petitioner; thus the presumption fails and a deprivation of the right to confront has occurred. *United States* v. *Longee*, 603 F.2d 1342, 1345 (9th Cir. 1979). *See also People* v. *Pettis*, 104 Ill. App. 3d 275, 432 N.E.2d 935 (1st Dist. 1982). The co-defendant's confession is hearsay and cannot be used as substantive evidence against the petitioner. *People* v. *Tyner*, 30 Ill. 2d 101, 195 N.E.2d 675 (1964). This Honorable Court noted in *Bruton* that there is no recognized exception to the hearsay rule permitting the trier of fact to consider a nontestifying co-defendant's confession against another defendant. 391 U.S. at 128 n.3. The co-

defendant's confession cannot be used against the petitioner on the theory that it is the statement of a co-conspirator, since it is merely a narrative of Mr. Thomas' version of what occurred, not a statement in furtherance of a conspiracy. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957); *People* v. *Simpson*, 39 Ill. App. 3d 318, 349 N.E.2d 441 (4th Dist. 1976). *See* Fed. R. Evid. 801(d)(2)(E).

On appeal before the Appellate Court of Illinois, Fifth Judicial District, the State of Illinois conceded that the trial court considered the co-defendant's confession as substantive evidence against the petitioner. (Brief for Plaintiff-Appellee at 3,8) Before This Honorable Court in its brief in opposition to her petition for a writ of certiorari the State again conceded that the trial court erroneously considered Mr. Thomas' confession against the petitioner. (Respondent's brief in opposition at 4-5) The Appellate Court of Illinois in its decision agreed that the trial court considered the co-defendant's confession against the petitioner (J.A. 34), however The Court rejected petitioner's contention that her sixth and fourteenth amendment rights were violated. (J.A. 34) The Court stated:

> It is well settled that a substantial difference exists between the *Bruton* rule and the interlocking confession situation. In the former situation, a jury hears only the co-defendant's statement incriminating the defendant who has himself made no admissions whatsoever, whereas in the latter situation, the jury hears a co-defendant's statement incriminating the defendant who had himself made similar inculpatory admissions. When the interlocking admissions are inculpatory, the admission of co-defendant's incriminating statement against defendant does not fall within the *Bruton* rule. Hence defendant's first argument fails. *People* v. *Bassett* (1974), 56 Ill. 2d 285, 307 N.E.2d 359, 365; *People* v.

Rosochacki (1969), 41 Ill. 2d 483, 244 N.E.2d 136, 141-42.

(J.A. 34)

The Appellate Court of Illinois' reliance upon *Bassett* and *Rosochacki* is a fundamental misapplication of the law. In *People* v. *Rosochacki*, 41 Ill. 2d 483, 244 N.E.2d 136 (1969), the Illinois Supreme Court held that where a nontestifying co-defendant's extrajudicial statement is admitted as evidence of the declarant's guilt at a joint jury trial in violation of the *Bruton* rule, the prejudice inherent in such evidence is diminished if the defendant has himself made a similar statement. For this reason, admission of a nontestifying co-defendant's interlocking confession can under some circumstances be harmless error. This was the position of Justices Brennan, Marhsall, Blackmun, and Stevens in *Parker* v. *Randolph*, 442 U.S. 62 (1979). In *People* v. *Bassett*, 56 Ill. 2d 285, 307 N.E.2d 359 (1974), the Illinois Supreme Court apparently adopted, *sub silentio*, the position that "interlocking confessions" do not fall within the *Bruton* rule. This was the position taken by Chief Justice Burger, and Justices Stewart, White, and Rehnquist in *Parker*.

In *Parker* This Honorable Court reviewed the order of the federal district court granting *habeas corpus* relief to three nontestifying co-defendants who had made interlocking confessions which were admitted at their joint jury trial. Chief Justice Burger and Justices Stewart, White, and Rehnquist expressed the view that the admission of interlocking confessions of nontestifying co-defendants *with proper limiting instructions* conforms to the requirements of the sixth and fourteenth amendments. Justice Rehnquist, writing for the four justices, reasoned that:

> The right protected by *Bruton*—the "constitutional right of cross-examination," id., at 137—has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a co-defendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury *unchallenged*.

Parker v. *Randolph*, 442 U.S. at 73 (emphasis added).

Justice Blackmun concurred in the results reached in the plurality opinion but disagreed with the view that there was *per se* no violation of the sixth amendment right of confrontation when the defendant has made a statement similar to that of his nontestifying co-defendent. Justice Blackmun expressed the view that admission of the nontestifying co-defendant's statement was error, that the degree of prejudice inherent in the error should be examined on a case-by-case basis, and that reversal was not required where the error was harmless beyond a reasonable doubt. *Parker* v. *Randolph*, 442 U.S. at 77-81.

Justice Stevens writing for the three dissenting justices reasoned that the plurality incorrectly assumed "that all unchallenged confessions by a defendant are equally reliable." *Parker* v. *Randolph*, 442 U.S. 84. Justice Stevens pointed out that in some cases the defendant's inculpatory statement may be ambiguous, incomplete or the result of coercive influences, and thus not sufficiently convincing to negate the prejudice inherent in violating the constitutional right to cross-examine the co-defendant. *Parker* v. *Randolph*, 442 U.S. at 84-86.

As the Illinois Supreme Court stated in *People* v. *Reichert*, 352 Ill. 358, 185 N.E. 585, 586 (1933), "[c]ourts have no more right than a jury to convict the accused on incompetent evidence." In *United States* v. *Longee*, 603 F.2d

1342 (9th Cir. 1979), the United States Court of Appeals for the Ninth Circuit recognized this principle and held that a *Bruton* problem may be reversible error in a trial before the bench without a jury. The Court in *Longee* stated:

> The fact that the defendants were tried to the court rather than to a jury does not eliminate the error. The disregard of incriminating evidence as against only one defendant in a joint trial has been termed "a mental gymnastic which is beyond, not only [the jury's] powers, but anybody's else." *Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (L. Hand, J.), *quoted in Bruton*, 391 U.S. at 132 n.8, 88 S.Ct. at 1626. It is for this reason that the use of a limiting instruction in a jury trial is inadequate to cure the error. *Bruton*, 391 U.S. at 135-37, 88 S.Ct. at 1627-29. Here, there was neither an objection by defense counsel nor an indication in the record that the district judge attempted to disregard Chaser's statements as evidence against Longee. Indeed, he specifically referred to them in his findings.

603 F.2d at 1345.

While the petitioner's and the co-defendant's statements contain many similarities, crucial differences do exist. Those crucial differences were the very points relied upon by the trial court in rejecting petitioner's defense at trial. The reasoning of the Appellate Court fails when it stated:

> Although the judge did consider co-defendant Thomas' confession, it is evident from the record that he considered the defendant's confession as well. Defendant's statement reveals her attack on Darden was not the result of self-defense, for after she had left Darden's bedroom originally there was no need for her to return to the bedroom. Furthermore, defendant alluded to a plan in her own confession,

where she stated:

Lee: Me, and Edwin [sic] had talked about stopping aunt Mattie from harassing me before.* * *

(J.A. 34). The Court incorrectly assumed that this showed a plan on the part of petitioner to murder Mattie Darden. Petitioner's statement does not show such an intent to kill, nor a plan to murder Mattie Darden. The Court ignored the continuation of petitioner's statement when she told the police:

> Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that [sic] when he began talking about doing something to aunt Beetty [sic], but *he never said what.* (emphasis added).

(J.A. 12) No prior plan between petitioner and the co-defendant can be found in petitioner's statement.

Justice Stevens' concern in *Parker* that the defendant's statement may be ambiguous or incomplete is present in this case. Petitioner's statement is incomplete in that it is not a confession to murder; it demonstrates neither an intent to kill nor premeditation on her part. It is incomplete in that the trial court had to utilize the co-defendant's confession to impute to petitioner a prior plan to commit murder. On the other hand, Justice Rehnquist's theory of harmlessness is not present. Contrary to the assertion in *Parker* that cross-examination and impeachment of the co-defendant's statement would "likely yield small advantage to the defendant," impeachment of the co-defendant's confession as to the existence of a plan and intention to kill would reap great dividends for the petitioner here.

The error in this case cannot be considered harmless error beyond a reasonable doubt as This Honorable Court enunciated that standard in *Chapman* v. *California*, 386

U.S. 18 (1967), and *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). In *Fahy* The Court stated: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87. This Honorable Court adhered to this statement in formulating the harmless beyond a reasonable doubt standard of *Chapman*. 386 U.S. at 23-24. There is not just the "reasonable possibility that" co-defendant Thomas' confession "might have contributed to the conviction" of the petitioner, but the certainty that the co-defendant's confession contributed to her conviction. The trier of fact stated that the co-defendant's confession was a contributing factor to her conviction. A determination that the constitutional error in this case was harmless beyond a reasonable doubt would be inappropriate.

This Honorable Court in *Bruton* was concerned that:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the confrontation clause was directed.

391 U.S. at 135-36. The Court in *Bruton* acknowledged "the impossibility of determining whether in fact the jury did or did not ignore [the co-defendant's] statement inculpating [Bruton] in determining [Bruton's] guilt." 391 U.S. at 136.

In this case we do not have just the danger that the trier of fact will not follow the law as in *Bruton*, but the trial court's own statement that it was not following the law. In his concurrence in *California* v. *Green*, 399 U.S. 149, 172-89 (1970), Justice Harlan traced the history of the confrontation clause of the sixth amendment and adopted the view that it was a constitutional assurance that a fair defense could be made to criminal accusations. Justice Harlan stated: "From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." 399 U.S. at 179. Justice Harlan also stated that "the paradigmatic evil the Confrontation Clause was aimed at [was] trial by affidavit. . . ." *Dutton* v. *Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring). Such evils are present in this case. Petitioner was not permitted to make a fair defense; she was unable to cross-examine the co-defendant since he did not testify at trial, and thereby became an absentee witness. The paradigmatic evil of trial by affidavit is presented in this case in a fashion more detrimental to a fair trial, since the co-defendant's statement was unsworn hearsay, not a sworn affidavit under the penalties of perjury. The trial court's consideration of Mr. Thomas' confession against petitioner is a flagrant abuse that the sixth amendment was designed to prohibit.

Petitioner respectfully requests This Honorable Court to reverse the judgments of the Appellate Court of Illi-

nois, Fifth Judicial District, and of the Circuit Court of St. Clair County, and remand the cause for a new trial.

CONCLUSION

The petitioner's right to confront the witnesses against her was violated by the court's consideration against her of her nontestifying co-defendant's confession. This Honorable Court's decisions in *Bruton* v. *United States* and *Parker* v. *Randolph* demonstrate that the Appellate Court of Illinois, Fifth Judicial District, erroneously determined that no constitutional violation occurred. Therefore, the petitioner prays that This Honorable Court reverse the judgments of the Appellate Court of Illinois, Fifth Judicial District and the Circuit Court of St. Clair County, and grant the petitioner a new trial.

Respectfully submitted,

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OCT 4 1985

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILLIE R. LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court, Fifth Judicial District

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the confession of Petitioner's codefendant was so reliable that its use as substantive evidence against Petitioner was fuliy consistent with the Confrontation Clause.

2. Whether Petitioner's claims arising under the Confrontation Clause can survive where she declined an opportunity to cross-examine the witness in question.

3. Whether, in a case where both Petitioner and her codefendant confess to two murders, the use of the codefendant's confession against Petitioner was merely harmless error.

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In The

Supreme Court of the United States

October Term, 1985

MILLIE R. LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court, Fifth Judicial District

BRIEF FOR RESPONDENTS

OPINIONS AND JUDGMENTS BELOW

The Order of the Illinois Appellate Court, Fifth District, affirming Petitioner's convictions is not reported. A full text of that Order is located in the Joint Appendix to this case, at pages 30-37.

The Order of the Illinois Supreme Court denying Petitioner's request for leave to appeal her conviction to the Illinois Supreme Court is not reported. The Order of the Illinois Supreme Court is reproduced in the Joint Appendix at page 38.

JURISDICTIONAL STATEMENT

Omitted pursuant to this Court's Rule 34.2.

CONSTITUTIONAL PROVISIONS INVOLVED

Omitted pursuant to this Court's Rule 34.2.

STATEMENT OF THE CASE

Petitioner, Millie Renee Lee, and a codefendant, Edwin Thomas, were jointly charged by a St. Clair County (Illinois) grand jury in a two-count indictment for murder. Count one charged the defendants with the murder of Mattie Darden, and count two charged them with the murder of Odessa Harris. (J.A., pp. 2-3) Consistent with Illinois law, *Ill. Rev. Stat.* ch. 38, § 9-1(a)(1), both counts alleged that defendants acted "without lawful justification and with the intent to kill" their victims. (*Id.*)

Evidence adduced at trial revealed that on the date of the murders, February 11, 1982, Petitioner and her two year old son shared an apartment with the Petitioner's aunt, Mattie Darden. (J.A. 5) On that date, Edwin Thomas, Petitioner's boyfriend, was with Petitioner and her son at that apartment when Darden returned home. Darden was accompanied by Odessa Harris (a/k/a Odessa Donohue) (hereinafter Odessa Harris) when they arrived at approximately 9:00 p.m.

Some time after the arrival of these two women, Edwin Thomas left the Darden apartment briefly. Upon his return, he and Petitioner argued in the kitchen about his departure. (J.A. 6, 17) As this discussion increased in volume, Odessa Harris came to the kitchen and asked Petitioner "what the hell was going on", saying Petitioner and Thomas "ought to be ashamed of [them]selves arguing and making all that noise." (J.A. 6) This prompted harsh words between Petitioner and Ms. Harris, after which Ms. Harris returned to the bedroom where Mattie Darden was located.

Petitioner then "called Odessa back into the kitchen", ostensibly to ask whether Mattie Darden had paid the rent. (*Id.*) As Harris stood with her back to Edwin Thomas, he attacked and stabbed her with a large knife, described as being "like a machette (sic)". (J.A. 7) Ms. Harris began calling out to Mattie Darden, who was still in the bedroom. Petitioner immediately "ran or walked" into Darden's bedroom, where she encountered Darden in the process of arising from her bed. Darden ordered Petitioner to "get out of her way" and displayed a knife, which she swung at Petitioner.* Petitioner promptly "ran into the kitchen", armed herself with a twelve-inch butcher knife, and returned to Darden's bedroom. (J.A. 7) She then stabbed her aunt repeatedly.

Edwin Thomas was still struggling with Odessa Harris during these two encounters between Petitioner and Mattie Darden. (J.A. 19-20) By the time Thomas had subdued Ms. Harris, Petitioner had already stabbed and disabled Darden. Then, Thomas entered the bedroom. Petitioner

---

* Weapons were apparently kept in this apartment as a routine matter "because a lot of burglaries and breakins" plagued the apartment complex. (J.A. 6)

told him to get a hammer. When Thomas was unable to find a hammer, Petitioner directed him to get a "cast iron skillet" from the kitchen because Darden "was still breathing." (J.A. 7) He brought the skillet to Petitioner, who used it to strike the prone figure of Mattie Darden about the head with sufficient force to shatter the skillet, but Ms. Darden was still alive so Petitioner told Thomas to get yet another skillet, which he did. Petitioner and Thomas then took turns using this second skillet as a bludgeon against Darden. (J.A. 7-8, 20) Afterwards, Mattie Darden "was barely breathing and Odessa [Harris] was dead." (J.A. 8)

Petitioner and Thomas then began their efforts to remove all evidence of the murders. They stuffed the body of Odessa Harris into a trunk and placed it in a trash heap. Petitioner then purchased charcoal lighter fluid (R. 55-59) which Thomas poured on the body of Ms. Harris. He then set the trunk on fire. (J.A. 9, 22) The following day Petitioner and Thomas discovered that Harris' body had not been completely consumed by this fire, so they placed the remains in a cardboard box and set it in a garbage area "to make it look like trash." (J.A. 10)

The body of Mattie Darden was taken by Petitioner and Thomas on the evening of the murders to a nearby vacant apartment, where it was placed in a closet. (J.A. 9) Three days later, Thomas returned to the apartment and, using the fluid purchased earlier by Petitioner, set fire to Darden's remains. (J.A. 11)

This latter fire was reported to the East St. Louis (Illinois) fire department and led to the discovery of Darden's body. (R. 13-16) Initially, police believed that the body in this vacant apartment was Harris' because Odessa Harris' purse was discovered near the scene. In an effort to get positive identification of these remains, the police went

to Mattie Darden's apartment, acting on the belief that Darden could provide the identification. (R. 99-102) Instead they encountered Petitioner, who told them that Darden was out of town visiting relatives. (R. 103) Because Petitioner said she knew Odessa Harris, she was asked to accompany the officers to view the body found in the vacant apartment.

While Petitioner was present at the police station, the police were informed that the body found in the vacant apartment was not that of Odessa Harris. They further learned that Petitioner had recently purchased lighter fluid in the neighborhood of the fire. (R. 103-108) Having already observed that Petitioner's apartment "was in quite a shambles" as if "someone had recently been painting the walls", (R. 102) the police decided to admonish Petitioner of her fifth amendment privileges.

Petitioner was then asked directly whether the body found in the vacant apartment was that of her aunt, Mattie Darden. She admitted it was. She was then asked whether she knew of Odessa Harris' whereabouts. Petitioner "said Odessa is dead . . . yeah, that's right, we killed them." (R. 109)

Petitioner thereafter made a full confession, reproduced in the Joint Appendix at pages 4-15. After being again advised of her rights, Petitioner told the police "that she just wanted to get it off her chest." (R. 32) Because her statement named Edwin Thomas, he was also brought to the police station.

When Thomas first arrived at the police station he declined to speak to the police. (R. 112) However, Petitioner requested permission to see Thomas, and he asked to see Petitioner. (R. 114) When the two were allowed to meet, Petitioner

> was allowed to hug and kiss Edwin, and she told Edwin they found out about the purse he was supposed to have gotten rid of. They knew about the whole thing, don't you love me Edwin, didn't you in fact say—more or less the same thing, that we wouldn't let one or the other take the rap alone, and he said yeah. (R. 114)

Thomas confessed immediately after this encounter. (*Id.*)

The confessions of both Petitioner and Thomas detail the events of February 11, 1982, and the subsequent efforts to conceal the homicides. As to events prior to that evening, Thomas' confession revealed that he and Petitioner had previously discussed killing Mattie Darden, "but we had not figure (sic) out just what we would do." (J.A. 17) Petitioner's confession, in turn, stated that she and Thomas "had talked about stoping (sic) aunt Mattie from harassing me before. . . . [and Thomas] began talking about doing something to aunt Beety but he never said what." (J.A. 12)

Thomas' confession detailed the fact that he asked Petitioner, on the evening of the murders, whether she wanted "to go through with it." (J.A. 17) He stated that Petitioner hesitated, but said yes. He also revealed that their plan required Petitioner to summon Odessa Harris into the kitchen and ask her about rental payments as a ruse to enable Thomas to attack Harris from behind. (J.A. 18) Petitioner's confession confirmed only that she summoned Harris into the kitchen just before Thomas stabbed Harris. (J.A. 6) It makes no other mention of conversations between Petitioner and Thomas in the moments preceding the Harris murder.

Petitioner and Thomas were appointed separate counsel for trial. Their pre-trial motions for severance were withdrawn on the day of trial, as was their demand for trial

by jury. (R. 3) The joint trial was combined with a hearing on each defendant's motion to suppress their confessions. (*Id.*) After the prosecution rested, each defendant testified in support of those suppression motions. (R. 205-228) Thereafter, the trial court denied both suppression motions and admitted Petitioner's and Thomas' confessions into evidence. (R. 227) Following closing arguments, the trial court found both Thomas and Petitioner guilty of two counts of murder. The court's announcement of its findings is reproduced in full in the Joint Appendix, pages 25-26.

Thomas perfected an appeal to the Illinois Appellate Court, Fifth District, in which he raised only the propriety of his sentence as an issue. *People v. Edwin Thomas*, No. 82-538 (Ill. App. Ct., 5th Dist.) (brief of defendant-appellant). Petitioner perfected her appeal to the same court, alleging 1) that the trial court's announcement of its verdict abridged her sixth amendment rights; 2) that a material witness to her confession was not called to testify at the motion to suppress; and 3) that her sentence was excessive. *People v. Millie R. Lee*, No. 82-539 (Ill. App. Ct., 5th Dist.) (brief for defendant-appellant). The Illinois Appellate Court rejected all three claims in an opinion reproduced at pages 30-37 of the Joint Appendix. Petitioner thereafter petitioned this Court for a writ of *certiorari* to review the Illinois court's rulings on the sixth amendment question. That petition was granted on July 1, 1985.

SUMMARY OF ARGUMENT

The use of her codefendant's confession as substantive evidence against Petitioner did not violate the Confrontation Clause because the codefendant was unavailable, the utility of cross-examination was slight, and the confession was cloaked with sufficient indicia of reliability. The reliability of the codefendant's confession is clear. The confession was a statement against penal interest; it was corroborated by the other physical and testimonial evidence produced at trial; it made no effort to shift or avoid responsibility; and the confession interlocked with Petitioner's own on all salient points, including the admitted conduct and relative culpability of Petitioner and her codefendant. Every act by Petitioner which constituted an element of the crime of murder is described in her codefendant's confession in the same fashion as she described her own conduct. Therefore, no constitutional error occurred when the codefendant's confession was used as evidence against Petitioner.

Moreover, no denial of confrontation rights may be found in this case because the trial transcript reveals that Petitioner declined an opportunity to cross-examine her codefendant at their joint trial for murder.

Finally, any constitutional error perceived in this case is harmless. Petitioner's own confession, as extensively corroborated by the physical and testimonial evidence produced at trial, constitutes proof beyond a reasonable doubt of her guilt for two crimes of murder. Because sufficient proof of guilt is shown apart from the evidence contained within the codefendant's confession, any sixth amendment error arising at their trial cannot be grounds for reversal of Petitioner's convictions.

ARGUMENT

I.

A CODEFENDANT'S CONFESSION, MADE AGAINST PENAL INTEREST, ACCEPTING HIS RESPONSIBILITY, AND INTERLOCKING WITH PETITIONER'S OWN CONFESSION IN ALL MATERIAL RESPECTS, IS SUFFICIENTLY RELIABLE FOR USE AS SUBSTANTIVE EVIDENCE WHERE THE CODEFENDANT IS UNAVAILABLE AND WHERE CROSS-EXAMINATION WOULD BE OF LITTLE VALUE. THEREFORE, NO SIXTH AMENDMENT ERROR OCCURRED AT TRIAL.

Although the instant case involves the use of a codefendant's confession as substantive evidence against Petitioner, its outcome is not directly governed by this Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968) because of procedural and factual distinctions between the two cases.

First, the "primary focus of the Court's opinion in *Bruton* was upon the issue of whether the jury in the circumstances presented could reasonably be expected to have followed the trial judge's instructions . . .". *Dutton v. Evans*, 400 U.S. 74, 86 (1970). Because of *Bruton's* emphasis on the adequacy of jury instructions, it has been widely held to be "simply inapplicable in the case [as here] of a bench trial." *United States ex rel. Faulisi v. Pinkney*, 611 F.2d 176, 178 (7th Cir. 1979); *see also* Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and A Proposal for A Due Process Evaluation of Limiting Instructions*, 18 Am. Crim. Law Rev. 1, 27 (1980).[1]

[1] For this reason, cases cited by the Petitioner, such as *United States v. Longee*, 603 F.2d 1342 (9th Cir. 1979), while no doubt

(Footnote continued on following page)

Second, *Bruton* is factually inapposite because, despite the fact that the confession of Bruton's codefendant Evans implicated him, Bruton "maintained his innocence from the beginning." *Parker v. Randolph*, 442 U.S. 62, 72 (1979). Petitioner, by contrast, "corroborated [her] codefendant's statements by heaping blame onto [her]self." *Id.* at 73.

Third, *Bruton* involved the spillover use against Bruton of a confession by his codefendant Evans which was later suppressed as evidence against Evans on grounds that it was "tainted" by improper police interrogation. As a result of that suppression, Evans' conviction was set aside by the Court of Appeals before this Court considered Bruton's appeal. *Bruton v. United States*, *supra*, 391 U.S. at 124, n. 1. Thus, the *Bruton* Court's fear that the jury, despite limiting instructions, might consider Evans' confession against Bruton was compounded by the fact that Evans' confession was "tainted" (and therefore unreliable) and could not be utilized even against its maker. The facts of this case stand in stark contrast: the Illinois trial court specifically found the confessions of Petitioner and her codefendant Edwin Thomas to have been made after knowing and voluntary waivers of their fifth amendment privileges, and on that basis admitted each confession into evidence at their joint trial. (R. 237)

Lastly, here, the question is not one of the efficacy of limiting instructions as in *Bruton*. The trial court's an-

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[1] *continued*
correct in their resolution of the Confrontation Clause issues raised at a bench trial, are less than precise in their reliance on *Bruton* as authority. *Longee* is also clearly distinguishable from this case, as the confessions there clearly failed to interlock on the fundamental question of relative culpability, thus calling the reliability of the hearsay statements into question.

nouncement of its verdict finding Petitioner guilty of murder (Joint Appendix in case 84-6807, *Lee v. Illinois*, at pages 25-26) (hereinafter "J.A.") indicates that the trier of fact relied, in part, on evidence contained within the confession of Petitioner's codefendant, Edwin Thomas, in deciding Petitioner's guilt. If Petitioner was not afforded an opportunity to cross-examine Thomas at their trial, a fact which will be assumed for the sake of this argument (*but see* Argument II, *infra*), this Court must then determine whether that substantive use of the hearsay confession denied Petitioner rights guaranteed her by the Confrontation Clause. *Pointer v. Texas*, 380 U.S. 400 (1965). This case thus raises a question which arises under the Confrontation Clause of the sixth amendment but which was not addressed by *Bruton*.

The present question is one foreseen in 1979 by Mr. Justice Stevens in his dissent from the plurality opinion in *Parker v. Randolph*, *supra*. In that case, this Court's plurality opinion held that the admission of interlocking confessions of nontestifying codefendants with proper limiting instructions does not constitute a violation of *Bruton*, but Mr. Justice Stevens' dissent observed that

> the factors relied on by the plurality support a proposition no one has even remotely advocated in this case—that the corroborated evidence used in this case was so trustworthy that it should have been fully admissible against all of the defendants, and the jury instructed as much. Conceivably, corroborating or other circumstances surrounding otherwise inadmissible hearsay may so enhance its reliability that its admission in evidence is justified in some situations. But before allowing such a rule to defeat a defendant's fundamental right to confront his accusers, this Court surely should insist upon a strong showing not only of the reliability of the hearsay in the particular case but also of the impossibility, or at

> least difficulty, of making the accusers available for cross-examination.

Parker v. Randolph, *supra*, 442 U.S. at 87 (footnote omitted).

It is that argument, not advanced by the parties or decided by the Court in *Parker*, which is clearly presented by the facts of this case. Respondents concede that the trial court in the instant case applied limited portions of Thomas' confession as substantive evidence against the Petitioner in rebuttal to affirmative defenses urged by her. Nonetheless, Respondents urge this Court to find that Thomas' statement was so reliable that its use was fully consistent with Petitioner's sixth amendment rights. *California v. Green*, 399 U.S. 149, 161 (1970).

The mission of the Confrontation Clause is to enhance the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *Dutton v. Evans*, *supra*, 400 U.S. at 89. Thus, while the Clause certainly "reflects a preference for face-to-face confrontation at trial" through cross-examination (*Ohio v. Roberts*, 448 U.S. 56, 63 (1980)), "all that the Sixth Amendment demands [is] 'substantial compliance with the purpose behind the confrontation requirement.'" *Id.*, 448 U.S. at 69, quoting *California v. Green*, *supra*, 399 U.S. at 166. Where hearsay evidence appears probative and reliable, the sixth amendment's preference for cross-examination will yield to society's legitimate interest in allowing the trier of fact to evaluate relevant and competent evidence which is inherently trustworthy. *See, e.g.*, *California v. Green*, *supra*.

In this case, implicit in the trial court's admission into evidence of the confession of the Petitioner and the confession of her codefendant Thomas, after a suppression hearing, is a specific finding that both confessions were

probative and reliable. Under these facts, to determine whether the use of Thomas' confession as substantive evidence against Petitioner ran afoul of the Confrontation Clause, this Court must answer two questions. *Ohio v. Roberts, supra.* First, has the prosecution demonstrated either that Thomas was unavailable as a witness so that admission of his confession was a necessity, or alternatively, that cross-examination was of such little value to Petitioner that it was unnecessary? Second, was Thomas' confession, although hearsay, sufficiently reliable to "augment accuracy in the factfinding process." *Id.*, 448 U.S. at 65; *see also* Fed. R. Ev., Rule 804(b)(3).

Application of this two-step analysis to the confession of Petitioner's codefendant, Edwin Thomas, clearly brings it within the category of admissible hearsay. Thomas was unavailable, cross-examination of him would have been of little value to Petitioner, and his confession was demonstrably reliable. Therefore, the admission of his confession as evidence against Petitioner satisfied both parts of the *Roberts* test, and no constitutional error occurred.

A. The Declarant Was Unavailable; Moreover, The Utility Of Cross-Examination Was Remote.

Edwin Thomas was jointly indicted with Petitioner on two counts of murder. (J.A. 2-3) He entered a plea of not guilty and stood trial alongside Petitioner after he and Petitioner withdrew their motions for severance. Obviously, at all times prior to and during trial he was possessed of his privilege against self-incrimination, and could not be required to testify in support of his detailed confession to murder. Just as obviously, Thomas was unlikely to waive this privilege to assist in the prosecution. The generally accepted view in facts like these is that Thomas was "unavailable" as a prosecution witness for purposes

of the necessity analysis. *California v. Green*, *supra*, 399 U.S. at 168, n. 17; *see also* McCormick, *Evidence*, § 253 at 608 (2d ed. 1972) ("While the rather general practice is to speak loosely of unavailability of the witness, the critical factor is the unavailability of this testimony . . . the witness may be physically present in court but his testimony nevertheless unavailable.")

Moreover, a

> demonstration of unavailability . . . is not always required. In *Dutton v. Evans [supra]* for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.

Ohio v. Roberts, *supra*, 448 U.S. at 65, n. 7. Certainly, the utility of cross-examination to Petitioner was, as to Thomas, extremely remote. Thomas had confessed to two murders in a statement which was virtually indistinguishable from that given by Petitioner when she confessed to the same murders. *Compare* J.A. 4-13 (confession of Petitioner) *with* J.A. 16-24 (confession of Thomas).

Under these facts, "the possibility that [Petitioner's] cross-examination of [Thomas] could conceivably have shown [the trier of fact] that the statement, though made, might have been unreliable was wholly unreal." *Dutton v. Evans*, *supra*, 400 U.S. at 89. The right to cross-examine Thomas had "far less practical value to [Petitioner after she] confessed to the crime." *Parker v. Randolph*, 442 U.S. 62, 73 (1979). The utility of any cross-examination by Petitioner of Thomas was, therefore, remote. Consequently, proof of unavailability is not required as a prerequisite to admission of Thomas' confession.

B. The Evidence Was Reliable.

Even where the unavailability/lack of utility prong is established, the Confrontation Clause bars the use of hearsay testimony unless the evidence is cloaked with sufficient "indicia of reliability." *California v. Green*, *supra*, 399 U.S. at 161. This Court must, therefore, determine "the 'reliability' of the statement . . . based on the circumstances under which it was given—circumstances that remain unaffected regardless of whether the witness is present or absent at the later trial." *Id.* at 167, n. 16. An analysis of the circumstances surrounding the making of Edwin Thomas' confession establishes beyond cavil the reliability of that confession.

Although neither *Parker* nor *Bruton* controls the outcome of this case,[2] both are instructive in analyzing the reliability of Thomas' confession, because both opinions discuss this Court's concerns about the reliability of a codefendant's confession which inculpates the defendant. It has been these concerns about reliability expressed in *Bruton* and *Parker* which have caused this Court to preclude the use of a codefendant's confession. However, once these concerns are identified and evaluated in the facts of this case, it will become apparent that none of the reliability problems foreseen in other cases exist here, and, therefore, Thomas' confession is properly admissible.

The primary concern expressed by the *Bruton* Court about the reliability of a codefendant's confession was the

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[2] The Respondents have already demonstrated that the result in this case is not dictated by the Court's opinion in *Bruton*, see *supra*. Similarly, the opinion in *Parker v. Randolph*, *supra*, is not controlling here because, as Mr. Justice Stevens pointed out, that case offered this Court no occasion to address the substantive admissibility of a codefendant's confession.

confessor's "recognized motivation to shift blame to others." *Bruton v. United States*, *supra*, 391 U.S. at 136. However, no such motivation is shown in the confession of Edwin Thomas. He made no attempt to shift blame to Petitioner. To the contrary, he freely described his own actions in stabbing Odessa Harris and in beating Mattie Darden. He attributes to himself conduct ascribed to him by Petitioner's confession, and attributes to Petitioner actions which she admits taking. This is reflected by Thomas' assurance to Petitioner before he confessed, while both were in police custody, that neither malefactor would be required to "take the rap alone." (R. 114). Thomas' confession was given immediately after that encounter. *Id.* Thus, this Court's first concern about the reliability of a codefendant's confession is simply not present in this case.

Second, implicit in *Bruton* is this Court's concern that a codefendant's confession may be unreliable because it results from coercion or is otherwise tainted by police interrogation techniques. The facts of *Bruton* made that concern a reality; *id.* at 124; *see also Parker v. Randolph*, *supra*, 422 U.S. at 86 (Stevens, J., dissenting). No such risk of unreliability exists here. The Illinois trial court, after a full hearing, held that both Thomas' and Petitioner's confessions were voluntarily given and not the product of any coercive police conduct. This ruling is amply supported by the record and can be fully credited by this Court. *See Schneble v. Florida*, 405 U.S. 427, 429 (1972).

Although less frequently voiced, other concerns about the general reliability of codefendant's confessions have influenced this Court's determination of admissibility. Such concerns include the possibility that a person may "confess" to a crime in an effort to curry police favor or from

a psychological need to assume blame, even though the confessor is not guilty. *See, e.g., Parker v. Randolph, supra*, 442 U.S. at 86, n. 6 (Stevens, J., dissenting). No such possibility exists here. Thomas' confession was fully detailed, internally consistent, corroborated by Petitioner's confession, and further corroborated in minute detail by the physical and testimonial evidence received at trial. There is no possibility that Thomas was confessing to crimes he did not commit; nor could his graphic and chilling descriptions of these murders be viewed as a misguided attempt to curry favor with the police. It is obvious that Thomas' confession accurately details his actions on the evening of these murders.

Not only are this Court's concerns about lack of reliability absent here, but there is a compelling, affirmative reason to conclude that Thomas' confession is fully reliable: Thomas' confession interlocks with the confession of Petitioner in every salient respect. This factor is consistent with the underlying premise adopted by the plurality opinion in *Parker* and makes the use of Thomas' confession against Petitioner proper under the sixth amendment. The confessions interlock in that both describe the same crimes, the same time and location of the crimes, the same victims, the same manner of attack, the same efforts to conceal the crimes, the same motives for the crimes, and both identify the same two perpetrators of the offenses, i.e., Petitioner and Edwin Thomas. But most significantly, each confession interlocks with the other regarding the relative culpability of the actors. This fact answers the last major concern voiced by members of this Court about the reliability of codefendants' confessions. *Parker v. Randolph, supra*, 442 U.S. at 79 (Blackmun, J., concurring); and *id.* at 84 (Stevens, J., dissenting). That concern stems from the difficult question of whether confessions "in-

terlock" where both parties confess to the same crime but differ as to which actor performed acts constituting a necessary element of the crime. *See, e.g., United States v. Parker*, 622 F.2d 298 (8th Cir. 1980), *cert. denied*, 449 U.S. 851 (1980). Respondents assert that Thomas' confession is shown to be reliable where it does not differ from Petitioner's confession on the pivotal issue of which defendant actually performed acts constituting the elements of the crime of murder. *United States v. Paternina-Vergara*, 749 F.2d 993 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1197 (1984).

Regarding the murder of Odessa Harris, Thomas' confession shows that he stabbed Harris. His confession does not assert that Petitioner stabbed Harris. Petitioner's confession, by comparison, also asserts that Thomas stabbed Harris and that Petitioner did not personally inflict any wounds upon the victim. Thus, Thomas' guilt as the principal actor in the Harris murder is shown by his confession and is corroborated by Petitioner's confession.

Conversely, Petitioner's own confession demonstrates that she was legally accountable for Thomas' murder of Harris, that accountable conduct is also detailed in Thomas' statement. Petitioner's confession reveals that after Thomas stabbed Harris, Harris began "moaning" and "calling" out to Mattie Darden (Petitioner's aunt) for help. (J.A. 7) Millie Lee did not aid Ms. Harris; Millie Lee did not allow Mattie Darden to aid Ms. Harris; indeed, to the contrary, Millie Lee "ran or walked" into Darden's bedroom and when Darden ordered Lee to "get out of her way", Lee armed herself with a knife and killed Darden. *Id.* These facts can only be described as conduct by Petitioner which assisted Thomas in the Harris murder by preventing Darden from interfering with that murder.

Thomas' confession describes Petitioner's conduct during the Harris murder in the same fashion. He states that after Harris was stabbed "she started calling for [Petitioner's] Aunt. She was calling 'Aunt Beedie, Aunt Beedie' . . . . I told [Petitioner] that she had to keep her Aunt Beedie quiet . . . I handed [Petitioner] the little knife . . .". (J.A. 19) This confession is equivalent to Petitioner's own as it describes those actions by Petitioner which made her accountable for Thomas' conduct in murdering Harris.

These actions of Petitioner lead to the wholly legitimate conclusion that Petitioner was legally accountable for Thomas' murderous actions in stabbing Odessa Harris. Under Illinois law, Petitioner can be found guilty of murder by accountability even where she struck no blows, provided it is shown that

> "(e)ither *before or during* the commission of an offense, and with the intent to promote *or facilitate* such commission, (s)he solicits, *aids, abets*, agrees or attempts to aid, such other person in the planning or commission of the offense.

Ill.Rev.Stat., ch. 38, § 5-2(c) (emphasis supplied). *See also People v. Richardson*, 32 Ill. 2d 472, 207 N.E.2d 478, 481 (1965), *cert. denied*, 384 U.S. 1021 (1965); *People v. Gil*, 125 Ill. App. 3d 892, 466 N.E.2d 1205, 1207-8 (1st Dist. 1984).

Thus, while the two confessions do not interlock "as to [some] details" (*United States v. Paternina-Vergara, supra*, 749 F.2d at 999), such as whether there was a predetermined plan to murder these victims on this specific occasion, that fact is of no moment here, for premeditation is not a necessary element of the crime of murder in Illinois, *Ill. Rev. Stat.*, ch. 38, § 9-1(a)(1), and defendants were not charged with conspiracy. (J.A. 2-3) What really matters is that as to the necessary elements of the

crime of Harris' murder and accountability for that crime of murder under Illinois law, the confessions interlock.

With regard to the second murder, Thomas' confession reveals that after Petitioner stabbed Mattie Darden, Petitioner asked him for a hammer. *Id.*, p. 20. He then describes his inability to find a hammer; Petitioner's request for and use of a skillet to beat Darden over the head; the breaking of the skillet; and the use of a second skillet. *Id.* He carefully details the fact that both he and Petitioner struck blows with this second skillet.

Petitioner described her acts in the murder of Mattie Darden in almost precisely the same way. Petitioner's confession does not detail mutual combat; it does not describe self-defense; it does not detail the crime of voluntary manslaughter as that offense is defined by Illinois law (*Ill.Rev. Stat.*, ch. 38, § 9-2).[3] Petitioner confessed that upon entering the bedroom and finding Darden with a knife in her hand, Petitioner immediately armed herself in the kitchen and returned to the bedroom "and then I stabbed her. I kept stabbing her." (J.A. 7)

Petitioner's confession also tracks Thomas' in its revelation that when her victim was totally disabled, she and Thomas began to smash her aunt's skull with an iron skillet. Such conduct constitutes murder under Illinois law. *See, e.g., People v. Thornton*, 26 Ill. 2d 218, 186 N.E.2d 259 (1962).

On its face, the Petitioner's statement is a confession to the necessary elements of the murder of Mattie Darden, as charged in the indictment in this case. Petitioner's confession admits conduct attributed to her by

[3] The text of this statute is set forth in Argument III, *infra*, at page 31.

Thomas, attributes to Thomas conduct admitted by him, and her confession interlocks with Thomas' on the relative culpability of each actor in performing those acts which constitute the elements of murder.

Thus, each confession interlocks with the other as to each separate murder, and the mutual agreement of the confessions as to the relative culpability of the actors provides a trier of fact with "the most knowledgeable and unimpeachable source of information about [their] past conduct." *Parker v. Randolph*, *supra*, 442 U.S. at 72, quoting *Bruton v. United States*, *supra*, 391 U.S. at 139-40 (White, J., dissenting). This circumstance lends to the Thomas confession sufficient indicia of reliability to justify the use of that confession as substantive evidence against Petitioner.

Still another factor militates in favor of allowing the Thomas confession to be used as substantive evidence:

> His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Dutton v. Evans, 400 U.S. 74, 89 (1970); *see also United States v. Harris*, 403 U.S. 573, 584 (1971) ("Admissions of crime . . . carry their own indicia of credibility . . ."); *United States v. Matlock*, 415 U.S. 164, 176 (1974) (same); Fed. Rule Evid. 804(b)(3); Comments: *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Cal. L. Rev. 1189, 1213 (1978) ("Inculpatory statements should be admitted under rule 804(b)(3) if they can pass a 'strict scrutiny with corroboration' test.") Thomas made his statement after being admonished about his privilege against self-incrimination and

under circumstances making him aware that his comments would subject him to criminal liability; therefore, his statement against penal interest is inherently reliable.

C. The Admissibility Of Thomas' Confession Under Illinois Law Does Not Control This Constitutional Question.

Petitioner urges that Thomas' confession was inadmissible evidence against her as a matter of Illinois law. (Pet. Brief, p. 11) Such an assertion, of course, is not determinative even if true. This Court's analysis in *Bruton*, for example, was based on factors of constitutional law "quite apart from the law of evidence." *Nelson v. O'Neil*, 402 U.S. 622, 626 (1971).

Furthermore, even if true, "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *California v. Green*, *supra*, 399 U.S. at 156. The issue before this Court is not whether the trial judge violated an Illinois rule of evidence. The issue raised is whether that court violated Petitioner's rights under the Confrontation Clause. In this regard, it is worth repeating that the Clause "has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant." *Parker v. Randolph*, *supra*, 442 U.S. at 73.

In any event, Respondents do not agree that there was a violation of Illinois' law of evidence. The authority on which Petitioner relies, *People v. Tyner*, 30 Ill. 2d 101, 195 N.E.2d 675 (1964), is inapposite. The *Tyner* opinion, which was announced four years before *Bruton*, addresses an analytically distinct issue from the question presented here. *Tyner* ruled on the use of a codefendant's confession

as substantive evidence against a defendant who had not himself confessed. As this Court's plurality opinion in *Parker v. Randolph* recognizes, and as Respondents have urged throughout this brief, the fact that Petitioner in this case herself gave a confession which interlocks with that of her codefendant allows for a much different Confrontation Clause analysis than that applied in *Tyner* or *Bruton*.

Moreover, Illinois' law of evidence has evolved in the two decades since *Tyner* was decided to assure consistency with the teachings of this Court on Confrontation Clause issues. Thus, in *People v. Tate*, 87 Ill. 2d 134, 144, 429 N.E.2d 470, 475 (1981) the Illinois Supreme Court, relying on *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973), recognized the admissibility of hearsay statements-against-penal-interest. *Chambers* held that the admission of such statements is constitutionally permissible where: (1) the statement was spontaneous and occurred shortly after the crime; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against penal interest; and (4) there was an adequate opportunity for cross-examination of the declarant. The Illinois Supreme Court, in turn, adopted these four factors as "objective indicia of trustworthiness" which, when present, render such statements admissible under Illinois law. *People v. Tate*, *supra*, 87 Ill. 2d at 144, 429 N.E.2d at 475.

Therefore, although the Illinois Supreme Court has never specifically decided the precise issue raised by the Respondents herein—whether a codefendant's statement against penal interest may be admitted against a confessing defendant where both confessions interlock as to all salient factual elements of the crime—Respondents believe that under the *Tate/Chambers* analysis, the Illinois Su-

preme Court would find that Edwin Thomas' confession meets all four criteria and would conclude that it was admissible.

The more immediate concern is, of course, whether the trial court's substantive use of Thomas' confession as evidence against Petitioner was permissible under the Confrontation Clause. Here, as in *California v. Green*, 399 U.S. 149 (1970), a ruling by this Court that Petitioner's Confrontation Clause rights were not abridged at her trial would allow the Illinois courts to subsequently determine whether any violation of Illinois' law of evidence occurred at trial. Here, as in *California v. Green*, the ruling of the Illinois Appellate Court addressed only the Petitioner's federal constitutional claim, and made no effort to analyze the question of admissibility under the State's law of evidence. Therefore, a ruling by this Court that no Confrontation Clause violation occurred would permit the parties to address, in an Illinois court, the question of whether Edwin Thomas' confession was shown to be sufficiently trustworthy to permit its admission under the statement-against-penal-interest exception outlined in *Chambers v. Mississippi* and *People v. Tate*. Such a question of first impression is appropriately left to the Illinois court, and that collateral question is wholly distinct from the constitutional issues ripe for decision by this Court.

Both Petitioner and Thomas confessed, freely and voluntarily, to two crimes of murder. Both did so fully aware of the legal consequences of those confessions. Each gave a fully detailed, internally consistent description of their crimes which admitted every factual element for the crime of murder, and which was thoroughly corroborated by the extrinsic evidence in this case. Each of their confessions interlocks with the other in the crucial area of relative culpability. Each confession was, for all these reasons, in-

herently reliable. As such, nothing in the Confrontation Clause of the Sixth Amendment, as construed by this Court, precluded the trier of fact from relying on the Thomas confession in its determination of Petitioner's guilt. Therefore, the Petitioner's claim to the contrary should be rejected, and her convictions for murder affirmed.

II.

PETITIONER'S SIXTH AMENDMENT RIGHTS WERE NOT TRANSGRESSED BY THE INTRODUCTION OF HER CODEFENDANT'S CONFESSION BECAUSE SHE WAS AFFORDED THE OPPORTUNITY TO CROSS-EXAMINE HER CODEFENDANT BUT DECLINED TO DO SO.

The Respondents' assertion that this case is not controlled by *Bruton v. United States*, 391 U.S. 123 (1968) is further supported by the fact that in this case, unlike *Bruton*, Petitioner had but declined the opportunity to cross-examine Edwin Thomas, whose confession was later used as evidence against Petitioner.

Petitioner's brief on the merits before this Court, at page 9, contains the following assertion:

> The co-defendant did not testify at their joint trial. Petitioner was therefore not able to subject his accusations to cross-examination and was thereby denied her right of confrontation.

The Respondents do not believe that this assertion accurately portrays the facts of this case as reflected by the trial transcript.

Petitioner and her codefendant were jointly indicted for the murders of Mattie Darden and Odessa Harris. (J.A. 1-2) Each defendant was provided with a public defender for trial, and prior to trial each defendant filed a motion for severance and a motion to suppress their confessions.

See Ill. Rev. Stat., ch. 38, §§ 114-8, 114-11. On the day trial began, the defendants withdrew their request for severance, indicated their intent to have the trial court decide their guilt or innocence without a jury, and asked the trial court to consider their motions to suppress "along with the body of the trial." (R. 3)

Thereafter, the prosecution presented its case in chief. Few prosecution witnesses were cross-examined by counsel for either defendant. The bulk of the cross-examination which was conducted by the defendants of State witnesses was clearly designed to address issues relevant to their motions to suppress. (*See, e.g.*, R. 43-54, 120-138.) When the prosecution rested its case it moved that each defendant's confession be admitted into evidence, but the court reserved ruling on admissibility until it had decided the suppression motion. (R. 204)

Petitioner's counsel then called Petitioner as a witness "for purposes of the motion to suppress the confession only." (R. 205) Petitioner testified to the circumstances surrounding her confession. (R. 205-218) Codefendant Thomas declined to cross-examine Petitioner. (R. 213) Petitioner then rested and Edwin Thomas was summoned to testify by his counsel "under the same caveat as before. He's testifying merely for the motion to suppress . . . (his) statement." (R. 219)

During direct examination of Edwin Thomas, he was questioned by his attorney as follows:

Q: What condition was [Petitioner] in when you saw her [at the police station before you confessed]?

A: She was crying.

Q: Was she telling you to do anything?

A: She told me to go on and tell what happened.

Q: And it is after all that that you finally *told them what happened*, is that correct?

A: Yes.

Q: Okay, I have no further questions.

[Petitioner's counsel]: *No questions*, your Honor.

(R. 223-224) (emphasis supplied.)

Respondents urge that these facts reveal that Petitioner "had an effective opportunity for confrontation" of the witness against her. *California v. Green*, 399 U.S. 149, 165 (1970). Here, as in *Green*, the declarant was under oath; Petitioner was represented by counsel; Petitioner had every opportunity to cross-examine Thomas as to his claim that he had "told them what happened"; and the proceedings were conducted before a judicial tribunal equipped to provide a judicial record of the proceedings. *Id.* In addition, Thomas was physically present, to enable the trier of fact an opportunity to evaluate his demeanor. *California v. Green*, *supra*, 399 U.S. at 158.

This Court's opinion in *Green* flatly rejected the notion that confrontation is inadequate unless it is available "contemporaneous[ly]" with the trial itself. *Id.* at 153. The *Green* opinion demonstrates that the opportunity for cross-examination at certain other stages of an adversary proceeding (in *Green*, a preliminary hearing) "provides substantial compliance with the purposes behind the confrontation requirement. . .". *Id.* at 166.

Following the logic of *Green*, the United States Court of Appeals for the Second Circuit has found, under facts virtually indistinguishable from this case, that a defendant is not denied his confrontation rights where an inculpatory, out of court statement by a codefendant is utilized at trial, and it is shown that the defendant had an opportunity to cross-examine that codefendant during a pretrial hearing on the voluntariness of the codefendant's statement. *United States ex rel. Duff v. Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert. denied*, 406 U.S. 432 (1972).

The same result obtains in the case at bar. Petitioner complains that she "was not premitted to make a fair defense" and that this case embodies the "paradigmatic evil of trial by affidavit. . .". Pet. Br. at 18. Yet she stood mute in court while her codefendant stated under oath that his confession was an accurate summary of "what happened" on the evening of the murders. Whatever tactical or strategic reasons led to the decision to forego cross-examination of Thomas are not determinative of the constitutional analysis. If anything, the likely reason was that Petitioner could not hope to persuade the trier of fact that Thomas' confession was unreliable where it so closely matched her own, *Dutton v. Evans*, 400 U.S. 74, 88 n. 19 (1970), a factor which only lends further support to Respondents' contention that no violation of the Confrontation Clause occurred here. *Id.* at 88-90.

Accordingly, because Petitioner was given an opportunity to confront all witnesses against her, no sixth amendment violation has been shown, and her convictions for murder should be affirmed.

III.

ERROR, IF ANY, ARISING FROM THE TRIAL COURT'S CONSIDERATION OF PETITIONER'S CODEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE AGAINST PETITIONER WAS HARMLESS BEYOND A REASONABLE DOUBT.

Since the decision in *Bruton v. United States*, 391 U.S. 123 (1968) was announced, this Court has consistently held that the harmless error doctrine applies to *Bruton*-type claims arising under the Confrontation Clause. *Harrington v. California*, 395 U.S. 250 (1969); *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Schneble v. Florida*, 405 U.S. 427 (1972). In so ruling, this Court has proceeded on the assumption

that the juries involved in those cases disregarded limiting instructions or other efforts at redaction and utilized hearsay declarations as substantive evidence. *See, e.g., Harrington v. California, supra*, 395 U.S. at 253. Therefore, the harmless error analysis of those cases is appropriately applied to the case at bar, where the trier of fact actually applied the confession of codefendant Edwin Thomas as substantive evidence against Petitioner.

Thus, even if Petitioner's sixth amendment rights were violated at her trial for murder in the Illinois court (*but see* Argument I, *supra*), that fact does not *per se* mandate reversal of the resultant murder convictions. *Schneble v. Florida, supra*, 405 U.S. at 430. Rather, such an assumption simply requires this Court to apply its harmless error analysis to determine whether any such error was harmless beyond a reasonable doubt. That judgment must be based on the Court's own reading of the record and on what seems to the Court to have been the "probable impact" of codefendant Thomas' confession on the trier of fact. *Harrington v. California, supra*, 395 U.S. at 254. Put another way, this analysis requires the Court to decide whether the State's case against Petitioner would have been "significantly less persuasive" absent the Thomas confession. *Schneble v. Florida, supra*, 405 U.S. at 432.

In perfecting an appeal from her convictions to the Illinois Appellate Court, Fifth District, the Petitioner's counsel made the following unqualified assertion: "(a)dmittedly, the [trial] court could have found the [Petitioner] guilty without considering Edwin Thomas' confession." Brief for Defendant-Appellant, *People v. Lee*, No. 82-539 (Ill. App. Ct. 5th Dist.), p. 18. That statement is absolutely correct. Petitioner's confession, as corroborated by the other physical and testimonial evidence received at her trial, is ade-

quate to support a finding that she is guilty of the crimes charged in the indictment.

Petitioner's confession establishes that she was present as an active participant when the two murders occurred. It reveals that Petitioner killed two women because she "just couldn't take anymore . . . harass(ment) . . ." from her victims. (J.A. 12) By its text the confession reveals that Petitioner was accountable (*see Ill. Rev. Stat.*, ch. 38, § 5-2(c)) for Edwin Thomas' act of stabbing Odessa Harris: once Thomas stabbed Harris and Harris began calling out to Mattie Darden for help, Petitioner confronted Darden, saw that Darden had a knife and then armed herself with a knife, stabbed Darden, her aunt, and thereby prevented her from aiding the wounded Ms. Harris. (J.A. 7) This course of conduct can fairly be construed in only one fashion: Petitioner intended to assist Edwin Thomas in the crime of murdering Odessa Harris. This fact makes Petitioner guilty of that murder under Illinois accountability principles.

Similarly, Petitioner's confession establishes her guilt for the murder of her "Aunt Beedie", Mattie Darden. The text of Petitioner's confession illustrates that she first confronted her aunt after Thomas stabbed Harris; Petitioner did so while Harris was "moaning" for help. *Id.* When Ms. Darden displayed a knife and told Petitioner to "get out of her way" (*id.*), Petitioner got a knife and stabbed her aunt repeatedly. Then, because the stabbing did not kill her aunt, Petitioner used a skillet to bring about that result.

Petitioner's confession does not, however, support her claim that she was only guilty of voluntary manslaughter and not murder. The Illinois statute defining voluntary manslaughter provides:

Voluntary manslaughter. (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Ill. Rev. Stat., ch. 38, § 9-2.

Petitioner's claim that she acted under "a sudden and intense passion resulting from serious provocation" is without any support. There are absolutely no facts in her confession reflecting any conduct by Mattie Darden which was provocative. Indeed, her confession contains almost no mention of Darden's actions on the evening of the murder prior to the Harris stabbing. Moreover, Petitioner made no effort at trial to indicate what conduct by Darden could possibly have provoked such an inflamed response.

In like manner, Petitioner cannot rely on the "imperfect self-defense" prong of the Illinois voluntary manslaughter statute. *Ill. Rev. Stat.*, ch. 38, § 9-2(b). To the contrary, Petitioner's confession conclusively rebuts any theory of self-defense based on the apprehension of imminent death or great bodily harm, reasonable or otherwise. *Id.* The confession states that after Petitioner stabbed Darden sev-

eral times with a foot-long butcher knife, the victim "fell onto the bed, and then slid onto the floor. She was still alive. She was moaning and groaning." (J.A. 7) Petitioner's victim was by then obviously disabled. She could pose no threat to any person. Petitioner's conduct from this point onward effectively discounts any claim of self-defense. Petitioner asked Thomas to find a hammer; he could not, so he brought Petitioner a cast iron skillet. Petitioner then struck Darden on the head with sufficiently venomous force to break this iron skillet into pieces. Undaunted, Petitioner requested and received a second skillet from Thomas, and she and Thomas then took turns bludgeoning the prone figure of Mattie Darden. All of these facts are contained within Petitioner's confession.

Nothing in Petitioner's statement dilutes her obvious intent to murder Mattie Darden. Nothing produced at Petitioner's trial would lend even slight credence to a claim that Petitioner acted under an apprehension, reasonable or unreasonable, that she faced imminent peril from Darden. The confession simply reveals an intent to commit murder.

Further, the Petitioner's confession is corroborated in all material ways by the physical and testimonial evidence received at her trial. That corroboration was so extensive and complete that the trier of fact felt compelled to comment on it in announcing its verdict. (J.A. 26) The weapons used, the lighter fluid which incinerated the victims' bodies, and the other physical evidence recovered from the murder scene all corroborate the details of Petitioner's confession. There was absolutely no evidence produced at trial which did not buttress the accuracy of Petitioner's confession. *See Schneble v. Florida*, *supra*, 405 U.S. at 431.

Under these circumstances, it is clear that the Edwin Thomas confession is merely cumulative evidence of Peti-

tioner's guilt, evidence which at most is corroborative of Petitioner's own detailed confession. Therefore, the trial court's announced findings in this trial were, at most, harmless error. *Schneble v. Florida, supra*, 405 U.S. at 430-432.

Petitioner's brief before this Court resists application of the harmless error doctrine by claiming that nothing in her confession shows "premeditation on her part" of "a prior plan to commit murder." Pet. Br. at 16. These assertions, even if accurate, are simply irrelevant. The Illinois murder statute requires proof of an intent to kill; it does not contain, as an element of the offense of murder, a requirement that the killing be premeditated. *Ill. Rev. Stat.*, ch. 38, § 9-1(a)(1).

In this regard, Respondents note that the trial court's announcement of its verdicts did express its belief that "a previously conceived plan to dispose of Miss Darden" existed between Petitioner and Edwin Thomas. This comment, based on Thomas' confession, is best understood in context.

During their closing arguments at trial, counsel for Thomas and Petitioner urged that, at most, their clients were guilty of voluntary manslaughter. Petitioner's counsel argued that she was not accountable for Thomas' murder of Odessa Harris, and that as to the murder of Mattie Darden, "a mutual quarrel [was shown to] support a verdict of voluntary manslaughter." (R. 234) Thomas' counsel argued that both murders were shown to have been committed "under an intense sudden passion." (R. 235)[4]

[4] Petitioner's brief before this Court, at page 10, appears to urge that both prongs of Illinois' voluntary manslaughter statute could apply to her case.

Immediately following these arguments, the trial court announced its verdict. (J.A. 25-26) Rejecting both the "mutual quarrel" and the "sudden and intense passion" efforts to mitigate the defendants' crimes from murder to voluntary manslaughter, the trial court noted that both claims were rebutted by evidence that the murders were planned beforehand.

This remark by the trial court is nothing more than a rejection of Petitioner's theory of defense by the use of Thomas' confession as rebuttal evidence. Even if such a usage constitutes a technical violation of the sixth amendment (*but see Tennessee v. Street*, ____ U.S. ____, 105 S.Ct. 2078 (1985)), such a violation is harmless error. Petitioner's claims of self-defense or sudden, intense passion are equally rebutted by her own confession, as is demonstrated above. Here again, the use of Thomas' statement simply could not have provided any more weight to the overwhelming evidence of guilt provided by the Petitioner's own voluntary, detailed, fully corroborated confession.

Application of the harmless error doctrine is particularly appropriate in this case. Petitioner is not like the usual defendant raising a *Bruton* claim; she does not come to this Court after consistently maintaining her innocence for the crimes charged. To the contrary, Petitioner decided at a very early stage of this case "that she just wanted to get it off her chest." (R. 32) Moreover, her lengthy and detailed confession interlocks, in all salient respects, with the allegedly inadmissible confession of Edwin Thomas. Here, as "in most interlocking-confession cases, any error in admitting the confession of a non-testifying codefendant will be harmless beyond a reasonable doubt." *Parker v. Randolph*, 442 U.S. 62, 78 (1979) (Blackmun, J., concurring in the result.)

Petitioner's guilt for two crimes of murder is plainly apparent from the record on appeal before this Court. Once her voluntary confession was placed before a trier of fact alongside the corroborating physical evidence recovered from the murder scene, no plausible set of circumstances can be imagined under which Petitioner could have been found guilty of any offense other than murder. The efficacy of the sixth amendment and the cause of justice are not advanced by a reversal of her convictions under these circumstances. Because any constitutional error arising at Petitioner's trial was, at most, harmless, Petitioner's convictions must be left undisturbed.

CONCLUSION

This Court has consistently chosen to construe the language of the Confrontation Clause in a pragmatic fashion, allowing the vested rights of criminal defendants to be fully protected while simultaneously recognizing that some forms of hearsay evidence are so reliable that they should be admissible as evidence to aid the trier of fact in reaching a just verdict. This case presents the Court with an opportunity to continue that tradition. Because the confession of Edwin Thomas has been shown to be reliable and trustworthy, the circumstances of this case establish that his confession could be used as substantive evidence against Petitioner without transgressing the sixth amendment. Therefore, Petitioner's convictions for murder should be affirmed.

Alternatively, Petitioner's convictions should be affirmed because she was afforded an opportunity to cross-examine her codefendant but chose not to do so. Such facts

preclude any finding that Petitioner was denied her rights under the sixth amendment.

Finally, Petitioner's convictions must be affirmed because she has freely and voluntarily confessed to two crimes of murder, and any perceived sixth amendment error arising at her trial was, in light of that corroborated confession, plainly harmless.

Respectfully submitted,

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No. 84-6807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILLIE R. LEE,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari
To The Appellate Court Of Illinois
Fifth Judicial District

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ARGUMENT

THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER WAS VIOLATED BY THE TRIAL COURT'S CONSIDERATION OF THE NONTESTIFYING CO-DEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE IN DETERMINING PETITIONER'S GUILT.

A. The Respondent's Position Before This Honorable Court Is A Major Departure From Well Settled Principles.

The petitioner Millie R. Lee has consistently maintained that her sixth and fourteenth amendment right to confront the witnesses against her was violated, that the trial court improperly considered co-defendant Edwin Thomas' confession as substantive evidence to reject her defense put forth at trial. The respondent State of Illinois' position has not been as consistent. In its brief on the merits before This Honorable Court, the State of Illinois contends for the first time that the co-defendant's confession was proper for use against the petitioner as substantive evidence. This position was not put forth by the State at trial and is at variance with its position in its response to the petition for a writ of certiorari. In its response to the petition before This Honorable Court the State of Illinois stated "a co-defendant's confession may be used only against the declarant" and the trial "court should not in any way have considered the co-defendant's confession against petitioner." (Respondent's brief in opposition at 4) Now the State of Illinois contends that the co-defendant's confession was so reliable and the utility of cross-examination of the co-defendant by petitioner so remote that the co-defendant's confession could be used as substantive evidence. This position is a major departure from well settled law since the adoption of the Constitution of the United States and should be rejected by This Court.

The proposition that a co-defendant's hearsay out-of-court statement made while in police custody may be used as substantive evidence against the defendant has been rejected in numerous cases before This Honorable Court. *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Fiswick* v. *United States*, 329 U.S. 211 (1946); *Logan* v. *United States*, 144 U.S. 263 (1892). Illinois courts have followed the same general rule. *People* v. *Tate*, 30 Ill. 2d 400, 197 N.E.2d 26 (1964); *People* v. *Clark*, 17 Ill. 2d 486, 162 N.E.2d 413 (1959); *People* v. *Tunstall*, 17 Ill. 2d 160, 161 N.E.2d 300 (1959); *People* v. *Buckminister*, 274 Ill. 435, 113 N.E.2d 713 (1916); *People* v. *Eddington*, 129 Ill. App. 3d 745, 473 N.E.2d 103 (4th Dist. 1984). Illinois Pattern Jury Instructions-Criminal 2d No. 3.08 instructs the jury that: "A statement made by one defendant may not be considered by you against any other defendant." See also 1 S. Gard, Illinois Evidence Manual, § 1107 at 455 (2d ed. 1979). Historically the courts have been concerned with co-defendant confessions because of the hearsay problem and the underlying concern of the general unreliability of hearsay. Justice White expressed those concerns in his dissent in *Bruton* v. *United States*, 391 U.S. 123, 141 (1968) when he stated:

> As to the defendant, the confession of the co-defendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . [T]he statements of a co-defendant have traditionally been viewed with special suspicion. [citations omitted] Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less than credible than ordinary hearsay evidence.

This Honorable Court in *Donnelly* v. *United States*, 228 U.S. 243, 273 (1913) stated:

> Hearsay evidence, with a few well recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safe-guards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extra-judicial declaration does so (especially where the alleged declarant is dead) free from the embarassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice.

While the Court has never equated the confrontation clause with the hearsay rule, they have similar concerns and roots. *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970). In *Douglas* v. *Alabama*, 380 U.S. 415, 419 (1965) This Court held that "[i]n the circumstances of this case, [Douglas'] inability to cross-examine [the co-defendant] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." In *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) This Honorable Court noted that a concession of constitutional error involving the right of confrontation was properly made by the State of Ohio involving the introduction into evidence against Brookhart of the out-of-court confession of the co-defendant who did not testify at trial. It is against this back-drop of cases that the respondent made its initial

concession of error in its response to the petition for a writ of certiorari and against which This Honorable Court must now judge respondent's pleas to alter the settled law. This Court in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), noted that it rejected "the invitation to overrule a near-century of jurisprudence" concerning the confrontation clause of the sixth amendment. 488 U.S. at 67 n.9. Your Honors should similarly reject the respondent's invitation in this case.

B. Co-Defendant Thomas Was Never Shown To Be Unavailable To Testify.

The respondent attempts to justify the use of co-defendant Thomas' confession against the petitioner in this case on the basis that Thomas was not available to testify at trial. (See Brief for Respondent at 13-15) This also is a position not taken or demonstrated by the State of Illinois in the trial court. The respondent's argument is based solely on the speculation of the respondent that if called to testify Thomas would have claimed his fifth amendment right against self-incrimination. At no time at trial did the State of Illinois ever attempt to call the co-defendant as a witness against the petitioner. This Honorable Court in *Ohio* v. *Roberts*, discussed the requirement of unavailability and stated: "We accept as a general rule, of course, the proposition that 'the possibility of refusal is not the equivalent of asking and receiving a rebuff.'" 448 U.S. at 76, quoting *Barber* v. *Page*, 390 U.S. 719, 724 (1968). The respondent has not shown that Thomas rebuffed any attempt by the State of Illinois to procure his testimony against the petitioner.

The Court in *Roberts* also stated "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may

demand their effectuation." 448 U.S. at 74. If the State of Illinois wished to have Thomas' version as evidence against the petitioner there were other options available to the prosecution to obtain his testimony against the petitioner. The prosecution could have engaged in a plea bargain with Thomas so that he would be willing to testify at any trial of the petitioner. The prosecution could have convicted Thomas of the offenses in a separate trial and then presented him as a witness at petitioner's trial where he could not claim any right against self-incrimination. The prosecution could have tried petitioner separately from Thomas and granted Thomas immunity from the use of his testimony against himself. *See Parker* v. *Randolph*, 442 U.S. 62, 87 (1979) (Stevens, J. dissenting). Without any attempt by the prosecution to obtain Thomas' testimony at trial, the respondent cannot now claim before This Court that Thomas was unavailable as a witness.

C. The Petitioner Was Not Able To Test The Veracity of The Co-Defendant's Confession And The State Has Not Demonstrated That The Co-Defendant's Confession Was Reliable On The Points Utilized By The Trial Court To Reject Petitioner's Defense.

The problem with the respondent's contention that the co-defendant's confession is completely reliable is that it is based solely on the areas in which the petitioner's statement and the co-defendant's confession agree as to what occurred and the physical evidence that corroborated how the bodies were later disposed. However, as pointed out in petitioner's brief, major differences exist between petitioner's statement and the co-defendant's confession. On these points of difference the co-defendant's confession is not corroborated by any other evidence.

A major fault with the respondent's reasoning is that it is based on a faulty syllogism. The basic syllogism the respondent relies on is:

1. Coerced and involuntary confessions and statements against penal interest are unreliable.

2. The trial court found that the co-defendant was not coerced and gave a voluntary confession.

Therefore the co-defendant's confession is reliable.

Unfortunately for the respondent's position, the major premise is not necessarily true and the conclusion does not follow from the premises. The purpose of suppression hearings is totally removed from questions of truth and falsity. This Honorable Court in *Jackson* v. *Denno*, 378 U.S. 368 (1964) held that the issue of voluntariness must first be decided by the trial judge before a confession can be admitted before a jury. The Court stated that a determination of the voluntariness of a confession was to be "a determination uninfluenced by the truth or falsity of the confession." 378 U.S. at 376-77. Your Honors recognized that the unreliability or reliability of a confession may have no relationship to whether the confession was coerced or uncoerced. Some coerced and involuntary confessions are reliable and true. Many uncoerced and voluntary confessions are unreliable and not true. *See Rogers* v. *Richmond*, 365 U.S. 534 (1961).

This Honorable Court has recognized the inherent problems in this area and has pointed out the dangers of the general unreliability of confessions by co-defendants and by accomplice testimony at trial. In *Bruton* v. *United States*, 391 U.S. 123, 136 (1968), the Court stated that the credibility of a co-defendant's confession "is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others." The same motivation to shift or share blame

is present in this case contrary to respondent's efforts to deny such a motivation. Respondent asserts in its brief:

> [Thomas] made no attempt to shift blame to Petitioner. To the contrary, he freely described his own actions in stabbing Odessa Harris and in beating Mattie Darden. He attributes to himself conduct ascribed to him by Petitioner's confession, and *attributes to Petitioner actions which she admits taking*. (Brief for Respondent at 16) (emphasis added)

This is the very heart of the problem because the co-defendant also attributes to petitioner actions which she does not admit taking. It is those actions attributed to petitioner by the co-defendant which have no demonstrable reliablity.

Motivation to shift blame does not merely encompass placing all blame on the defendant by the guilty co-defendant and thereby absolving himself of any blame, as respondent seems to suggest; it also encompasses various gradations. An individual being questioned by the police may try to shift all, most or some of the blame to another. A co-defendant may also detail actions in an out-of-court statement which places blame on himself, but untruthfully represent the defendant's degree of culpability. Various psychological factors contribute to this shifting and sharing of blame, including not wanting to be perceived as the only actor, to demonstrate that another believed the action taken was necessary, to curry favor, or to drag another down with him.

In this case Thomas was arrested and questioned only because the petitioner had given the police a statement implicating him. Thomas' responsibility may very well have never been uncovered but for the petitioner. Thomas therefore had reason to bear malice toward the petitioner. Thomas may very well have embellished petitioner's role

in the killings to ensure that petitioner, who caused his problem, went with him. Thomas testified on his motion to suppress his confession that he gave his confession only after he had been informed that petitioner gave a statement implicating him in the two deaths, and was told that he would "burn" unless he talked. (R.222-24) This sequence of events not only demonstrates the possibility of malice towards petitioner, but the possibility of an attempt to "curry police favor."

While respondent contends that there is no possibility Thomas was trying to curry favor (Brief for Respondent at 16-17), such possiblity does exist. While Thomas' account may be "chilling," it may also be exactly what Thomas believed the police required him to relate so that he would not "burn." Thomas' testimony that he was threatened with the death penalty unless he confessed supports the possibility that Thomas was currying favor to avoid the possibility of the death penalty. Also, while it is not clear from the record to what extent Thomas was informed of petitioner's statement, he may have been embellishing petitioner's participation to curry favor with the police, since the police were not totally satisfied with petitioner's statement in the area of intent to kill. Thomas' confession certainly heaps more blame upon the petitioner in that critical area. Thomas' confession is touched with all these factors and many that are hidden. What is known is that Thomas' confession differs considerably from petitioner's statement.

Only Thomas' confession details that there was a prior plan and discussions between Thomas and petitioner to kill Mattie Darden. Only Thomas' confession details that petitioner and he also discussed having to kill Odessa Harris in connection with the plan to kill Mattie Darden. Only Thomas' confession details that petitioner

intentionally lured Harris back to the kitchen in order to facilitate Thomas' attack on Harris. These assertions by Thomas are not in petitioner's statement. These assertions by Thomas are not corroborated by any evidence. These assertions are not shown to be reliable beyond Thomas' merely making the statements to the police. However, these are the points upon which the trial court relied in rejecting petitioner's defense and finding her guilty of murder.

Other differences exist between petitioner's statement and Thomas' confession beyond what Thomas told the police and what petitioner did not. The details of the stabbing of Odessa Harris vary in significant detail between Thomas' version and petitioner's. Petitioner's statement details that her conversation with Harris was finished and Harris was walking back to Darden's bedroom when Thomas stabbed Harris in the back while Harris was in the hall. (J.A.6-7, 13) However, Thomas' confession details that he approached Harris while she was in the kitchen talking to petitioner and that he attempted to stab Harris in the back, but was caught by Harris and he had to wrestle Harris to the floor. Thomas stabbed Harris while she was lying on the floor on her back. (J.A.18-19) There is no independent corroboration to demonstrate that Thomas' version is correct on this point.

Thomas' confession also details that after he stabbed Harris he told petitioner she had to keep Darden quiet and handed petitioner a knife. (J.A.19) However, petitioner merely indicated that she ran or walked into Darden's bedroom, was confronted by Darden with a knife, and ran back to the kitchen to obtain a knife. (J.47) If petitioner already had a knife, as Thomas stated, there would be no need for petitioner to run out of Darden's

bedroom to obtain a knife as petitioner stated. However, respondent uses both of these different statements in its brief in an attempt to demonstrate petitioner's guilt of two murders. (Brief for respondent at 18-19) The respondent uses Thomas' version to bolster the contention that petitioner was accountable for Thomas' actions by aiding Thomas in the murder of Harris by preventing Darden from interfering in the murder of Harris since she took a knife into the room originally. Thomas' version also demonstrates prior knowledge and agreement in his actions by petitioner. However, respondent also uses petitioner's version in an attempt to demonstrate that petitioner's actions in killing Darden was not voluntary manslaughter by arguing that once petitioner left the bedroom to obtain the knife there was no need for her to return, and thus no reasonable basis for believing her actions against Darden were justified.

Respondent asserts that cross-examination of Thomas by petitioner would have been of little value to petitioner to demonstrate Thomas' statement was unreliable. (Brief for Respondent at 14, 28) However, the respondent assumes that if Thomas had been called as a witness he would have affirmed his confession as being true. Thomas pled not guilty to these offenses and moved to suppress his confessions, factors that detract from the respondent's claim of reliability. Whether Thomas would have affirmed all or part of his confession, or repudiated all or part of his confession is not known. What is known is that Thomas did not testify and petitioner was unable to cross-examine Thomas to test the reliability of his out-of-court confession. Cross-examination of Thomas may well have caused Thomas to repudiate those parts of his confession which detailed an intent to kill on petitioner's part, or have demonstrated those assertions to be unreliable. The

very purpose of cross-examination is to test reliability before the trier of fact. In this case the trier of fact never observed Thomas make his devastating allegations against the petitioner and was never able to determine their reliability.

Petitioner reasserts, as in her original brief, that her statement to the police was not a confession to two murders. Admittedly it is a statement against her penal interest in that it is a confession to the offense of concealment of a homicidal death. (Ill. Rev. Stat., 1985, Ch. 38, § 9-3.1) Admittedly, it is a statement that might permit the finder of fact at trial to find her guilty of voluntary manslaughter or murder based upon inferences from the proper evidence. However, it was not a confession to murder, since she never confessed to the requisite element of intent, she never admitted that she intended to kill either Harris or Darden. She never admitted she planned with Thomas to kill or aid him in killing. Consequently this is not an "interlocking confessions case," as petitioner has put forth before, and Thomas' confession has not been demonstrated to be reliable to impute to her such an intent.

D. Petitioner Did Not Waive The Opportunity To Test The Truth Or Falsity of The Co-Defendant's Confession And The Parts Detailing Her Intent To Kill.

The State of Illinois contends for the first time that petitioner had an adequate opportunity to cross-examine the co-defendant, since the co-defendant testified in connection with his motion to suppress his confession as involuntary and the petitioner did not cross-examine him. This is a position not put forth by the State of Illinois in petitioner's appeal in the Appellate Court of Illinois, Fifth Judicial District.

The respondent cites the case of *United States ex rel. Duff* v. *Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert.*

denied, 405 U.S. 432 (1972) for its position. *Zelker* is extremely unpersuasive authority for this proposition and provides no analysis for the assertion. In *Zelker* the Court had already determined that no reversible error occurred under *Bruton* since the two co-defendants of Zelker had made interlocking confessions. As an aside the Court stated in one short paragraph that one co-defendant had been cross-examined by Zelker at a pretrial motion to suppress and therefore no denial of confrontation was involved concerning that co-defendant's confession. Petitioner contends that she in fact had no opportunity to confront the co-defendant concerning the truth or falsity of his confession and the parts which implicated her more seriously.

The respondent fails to consider the only purpose for which co-defendant Thomas testified was in support of his motion to suppress his confession as being involuntary, not as part of his case-in-chief at trial. (R.205, 219) *See* Ill. Rev. Stat., 1985, Ch. 38, § 114-11. This Honorable Court in *Jackson* v. *Denno*, 378 U.S. 368, 376-77 (1964) held that a defendant has a constitutional right to object to the use of an allegedly involuntary confession "and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." The Illinois Supreme Court has stated similarly that "[i]n determining admissibility of a confession the ultimate test is the test of voluntariness made without reference to the probable truth or falsity thereof." *People* v. *Hudson*, 38 Ill. 2d 616, 233 N.E.2d 403, 405 (1968). In this case, the hearing to determine the admissibility of Thomas' confession was held during the bench trial, instead of in a pre-trial hearing, a procedure authorized under Illinois law. *See People* v. *Fultz*, 32 Ill. App. 3d 317, 336 N.E.2d 288 (1st Dist. 1975). Since

Thomas was testifying only in support of his motion to suppress the confession the truth or falsity of the confession was not at issue, and the petitioner was not able to cross-examine Thomas as to the truth or falsity of those parts of his confession which were damaging to the petitioner. While petitioner may have been free to question Thomas concerning facts within his knowledge as to the voluntary nature of petitioner's statement, petitioner was not given free rein to stray beyond the bounds of the intended purpose of his testifying. The State of Illinois' cross-examination of both petitioner and Thomas during their testimony demonstrates that it understood the purpose of the testimony was only as to voluntariness and did not allow the prosecutor to cross-examine concerning the truth or falsity of either Thomas' confession or petitioner's statement. *Compare United States* v. *Wingate*, 520 F.2d 309, 315-16 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976) (defendant may not introduce co-defendant's suppression hearing testimony at trial, since prosecution unable to cross-examine co-defendant as to defendant's guilt). Consequently, petitioner's failure to examine Thomas was not, as respondent asserts, "that petitioner could not hope to persuade the trier of fact that Thomas' confession was unreliable where it so closely matched her own" (Brief for Respondent at 28), but that petitioner had no such opportunity.

CONCLUSION

In *Dutton* v. *Evans*, 400 U.S. 74, 87 (1970) the plurality opinion examined the cases decided by this Court under the confrontation clause and determined that the concerns expressed in those cases were not present in that case. The plurality in *Evans* stated: "This case does not involve evidence in any sense 'crucial' or 'devastating' . . . ." The case before this Court does; the co-defendant's

hearsay confession was both crucial and devastating since the trial court rejected petitioner's defense based on the co-defendant's confession. The plurality in *Evans* stated: "It does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation. . . ." The case before this Court does, since the trier of fact used and misused the co-defendant's custodial confession. The plurality in *Evans* stated: "It does not involve any suggestion of prosecutorial misconduct or even negligence. . . ." The case before this Court does, since the prosecution never attempted to obtain the co-defendant's testimony at trial. The plurality in *Evans* stated: "It does not involve the use by the prosecution of a paper transcript. . . ." The case before this Court does, since the co-defendant's confession was committed to paper and relied upon by the trial court in the determination of petitioner's guilt. The plurality in *Evans* stated: "It does not involve a joint trial. . . ." The case before this Court does. The plurality in *Evans* stated: "And it certainly does not involve the wholesale denial of cross-examination. . . ." The case before this Court does, since the petitioner was unable to cross-examine the co-defendant at trial concerning the devastating allegations in his confession as to petitioner's intent to kill. Petitioner's defense at trial was that she did not have the requisite intent and the trial court imputed such an intent to her on the basis of the co-defendant's confession. The co-defendant never testified at trial except in connection with his motion to suppress his confession and the petitioner was not able to confront the co-defendant concerning the veracity of the confession. Consequently, the petitioner's sixth and fourteenth amendment right to confront the witnesses against her was violated. The petitioner respectfully requests that This Honorable Court reverse the judgments of the Appellate Court of Illinois, Fifth Judicial

District, and the Circuit Court of St. Clair County, and grant her a new trial free from such constitutional error.

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